

## BUILDING INTELLECTUAL PROPERTY INFRASTRUCTURE ALONG CHINA’S BELT AND ROAD

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### INTRODUCTION

In the past decade, China has played pivotal roles in developing initiatives such as the BRICS Summit,<sup>1</sup> the Regional

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<sup>1</sup> Featuring the BRICS countries (Brazil, Russia, India, China, and South Africa), the annual BRICS summit has been held in New Delhi (India), Durban (South Africa), Fortaleza (Brazil), Ufa (Russia), Goa (India), Xiamen (China), and Johannesburg (South Africa). See Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 AM. U. L. REV. 1045, 1116 (2018) [hereinafter Yu, *Half-Century of Scholarship*] (noting the past BRICS summits); see also Peter K. Yu, *Intellectual Property Negotiations, the BRICS Factor and the Changing North-South Debate*, in THE BRICS-LAWYERS’ GUIDE TO GLOBAL COOPERATION 148 (Rostam J. Neuwirth et al. eds., 2017) [hereinafter BRICS-LAWYERS’

Comprehensive Economic Partnership<sup>2</sup> (RCEP), the New Development Bank,<sup>3</sup> and the Asian Infrastructure Investment Bank.<sup>4</sup> China has also negotiated a number of bilateral and regional free trade agreements (FTAs), connecting the country to markets in Asia, Australasia, Europe, South America, and other parts of the world.<sup>5</sup> Many of these agreements include provisions or chapters on intellectual property protection and enforcement.<sup>6</sup>

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GUIDE] (discussing the “BRICS factor” in international trade and intellectual property negotiations). For discussions of the BRICS countries, see generally BRICS AND DEVELOPMENT ALTERNATIVES: INNOVATION SYSTEMS AND POLICIES (José Eduardo Cassiolato & Virginia Vitorino eds., 2011); BRICS-LAWYERS’ GUIDE, *supra*; ANDREW F. COOPER, THE BRICS: A VERY SHORT INTRODUCTION (2016); AMRITA NARLIKAR, NEWPOWERS: HOW TO BECOME ONE AND HOW TO MANAGE THEM (2010); JIM O’NEILL, THE GROWTH MAP: ECONOMIC OPPORTUNITY IN THE BRICS AND BEYOND (2011).

<sup>2</sup> For the Author’s discussions of the RCEP negotiations, see generally Peter K. Yu, *The RCEP Negotiations and Asian Intellectual Property Norm Setters*, in THE FUTURE OF ASIAN TRADE DEALS AND INTELLECTUAL PROPERTY (Liu Kung-Chung & Julien Chaisse eds., forthcoming 2019) [hereinafter Yu, *Asian Norm Setters*]; Peter K. Yu, *TPP, RCEP, and the Crossvergence of Asian Intellectual Property Standards*, in GOVERNING SCIENCE AND TECHNOLOGY UNDER THE INTERNATIONAL ECONOMIC ORDER: REGULATORY DIVERGENCE AND CONVERGENCE IN THE AGE OF MEGAREGIONALS 277 (Peng Shin-yi et al. eds., 2018) [hereinafter Yu, *Crossvergence*]; Peter K. Yu, *TPP, RCEP and the Future of Copyright Normsetting in the Asia-Pacific*, in MAKING COPYRIGHT WORK FOR THE ASIAN PACIFIC? JUXTAPOSING HARMONISATION WITH FLEXIBILITY 19 (Susan Corbett & Jessica C. Lai eds., 2018) [hereinafter Yu, *Copyright Normsetting*]; Peter K. Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, 50 VAND. J. TRANSNAT’L L. 673 (2017) [hereinafter Yu, *RCEP and Trans-Pacific Norms*].

<sup>3</sup> “China is . . . a founding member of the New Development Bank (NDB) consisting of the so-called BRICS countries . . . . The NDB, established in July 2015, is . . . intended [for] lending money for infrastructure projects to developing countries.” Daniel C. K. Chow, *Why China Established the Asia Infrastructure Investment Bank*, 49 VAND. J. TRANSNAT’L L. 1255, 1273 n.111 (2016); see also *id.* (discussing the New Development Bank). See generally Christiane Itabaiana Martins et al., *The BRICS Bank: On the Edge of International Economic Law and the New Challenges of Twenty-first Century*, in BRICS-LAWYERS’ GUIDE, *supra* note 1, at 180 (discussing the BRICS Bank).

<sup>4</sup> See Chow, *supra* note 3, at 1286–96 (discussing how China could use the Asian Infrastructure Investment Bank as a tool to further its policy goals).

<sup>5</sup> For discussions of China’s free trade agreements, see generally THE CHINA-AUSTRALIA FREE TRADE AGREEMENT: A 21ST-CENTURY MODEL (Colin Picker et al. eds., 2018); Henry Gao, *The RTA Strategy of China: A Critical Visit*, in CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS 53 (Ross Buckley et al. eds., 2008); Marc Lanteigne, *Northern Exposure: Cross-Regionalism and the China-Iceland Preferential Trade Negotiations*, 202 CHINA Q. 362 (2010); Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953 (2011) [hereinafter Yu, *Sinic Trade Agreements*].

<sup>6</sup> See *infra* text accompanying notes 25–27.

One new initiative that has not received much scholarly and policy attention from intellectual property commentators<sup>7</sup> concerns the slowly emerging “One Belt, One Road” Initiative,<sup>8</sup> which has now been officially translated as the Belt and Road Initiative (BRI).<sup>9</sup> Launched in fall 2013, this initiative features two distinct routes: the land-based Silk Road Economic Belt and the sea-based 21st-century Maritime Silk Road. As David Shambaugh described:

[The BRI sought] to build infrastructure and facilitate commercial “connectivity” from northwestern China across Eurasia and from southeast China to Africa and the eastern Mediterranean. Through [this and other] initiatives, China is meticulously constructing an alternative and parallel global institutional architecture to the postwar western order.<sup>10</sup>

This Article aims to introduce this new initiative to intellectual property literature. Part I documents the recent changes

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<sup>7</sup> Some rare exceptions are Lee Jyh-an, *The New Silk Road to Global IP Landscape*, in LEGAL DIMENSIONS OF CHINA’S BELT AND ROAD INITIATIVE 417 (Lutz-Christian Wolff & Xi Chao eds., 2016) [hereinafter LEGAL DIMENSIONS]; Peter K. Yu, *China, the “Belt and Road” and Intellectual Property Cooperation*, 14 GLOBAL TRADE & CUSTOMS J. (forthcoming 2019).

<sup>8</sup> For book-length treatments of this initiative, see generally BELT AND ROAD: A CHINESE WORLD ORDER (Bruno Maçães ed., 2019); CHINA’S BELT AND ROAD INITIATIVES AND ITS NEIGHBORING DIPLOMACY (Zhang Jie ed. & Xu Mengqi trans., 2017) [hereinafter CHINA’S BELT AND ROAD INITIATIVES]; CHINA’S ONE BELT ONE ROAD: INITIATIVE, CHALLENGES AND PROSPECTS (Bal Kishan Sharma & Nivedita Das Kundu eds., 2016) [hereinafter CHINA’S ONE BELT ONE ROAD]; CHINA’S ONE BELT ONE ROAD INITIATIVE (Lim Tai-Wei ed., 2016); CHINA’S PRESENCE IN THE MIDDLE EAST: THE IMPLICATIONS OF THE ONE BELT, ONE ROAD INITIATIVE (Anoushiravan Ehteshami & Niv Horesh eds., 2018) [hereinafter CHINA’S PRESENCE IN MIDDLE EAST]; INTERNATIONAL GOVERNANCE AND THE RULE OF LAW IN CHINA UNDER THE BELT AND ROAD INITIATIVE (Zhao Yun ed., 2018) [hereinafter INTERNATIONAL GOVERNANCE]; MAPPING CHINA’S “ONE BELT ONE ROAD” INITIATIVE (Li Xing ed., 2019) [hereinafter MAPPING CHINA’S OBOR INITIATIVE]; TOM MILLER, CHINA’S ASIAN DREAM (2017); RETHINKING THE SILK ROAD: CHINA’S BELT AND ROAD INITIATIVE AND EMERGING EURASIAN RELATIONS (Maximilian Mayer ed., 2018) [hereinafter RETHINKING SILK ROAD]; WANG YIWEI, THE BELT AND ROAD INITIATIVE: WHAT WILL CHINA OFFER THE WORLD IN ITS RISE (2016).

<sup>9</sup> See NAT’L DEV. & REFORM COMM’N ET AL., VISION AND ACTIONS ON JOINTLY BUILDING SILK ROAD ECONOMIC BELT AND 21ST-CENTURY MARITIME SILK ROAD (2015) [hereinafter VISION AND ACTIONS] (providing the official translation of a guiding document issued by the National Development and Reform Commission, the Ministry of Foreign Affairs, and the Ministry of Commerce, with the State Council’s authorization).

<sup>10</sup> DAVID SHAMBAUGH, CHINA’S FUTURE 162–63 (2016).

to China's approach toward international intellectual property norm setting. This Part highlights three notable developments that have greatly enhanced the country's ability to shape future norms in this area: the negotiation of bilateral and regional FTAs, the establishment of the RCEP, and the launch of the BRI. Part II recognizes the key analytical challenges concerning the BRI and outlines five sets of inquiries that could help enhance our understanding of the initiative. This Part points out that the initiative's lack of development in the intellectual property area has presented a rare opportunity to shape its future. In view of this opportunity, Part III examines six distinct areas of potential cooperation: substantive standards, procedural arrangements, cross-border enforcement, dispute resolution, technical cooperation, and market aggregation. Focusing on each area in turn, this Part highlights some of the BRI's potential constructive possibilities. This Article concludes by briefly identifying three distinct camps that subscribe to very different views on the initiative's prospects and perils.

### *I. China's Changing International Approach*<sup>11</sup>

In the past two decades, China's international profile has been changing rapidly. Although the country has become more active following its entry into the World Trade Organization (WTO),<sup>12</sup> its involvement has remained tentative until recently. This tentative position can be attributed to a confluence of factors, including the Chinese leaders' priority focus on domestic matters, the country's need to cultivate goodwill from its neighbors, the complications created by the changing Chinese political leadership, the WTO-plus concessions China had made when it joined the international trading body, and the highly uneven developments within the country.<sup>13</sup>

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<sup>11</sup> This Part draws on research from Peter K. Yu, *The Rise of China in the International Intellectual Property Regime*, in HANDBOOK ON THE INTERNATIONAL POLITICAL ECONOMY OF CHINA 424 (Zeng Ka ed., 2019) [hereinafter Yu, *Rise of China*].

<sup>12</sup> China became the 143rd member of the WTO in December 2001. See Press Release, World Trade Org., WTO Ministerial Conference Approves China's Accession (Nov. 11, 2001), [https://www.wto.org/english/news\\_e/pres01\\_e/pr252\\_e.htm](https://www.wto.org/english/news_e/pres01_e/pr252_e.htm) [<https://perma.cc/884L-A7HY>] (announcing China's admission to the WTO).

<sup>13</sup> See Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 13 OR. REV. INT'L L. 209, 229–37 (2011) [hereinafter Yu, *Middle Kingdom*] (discussing these factors).

To some extent, China's international approach in the first decade and a half following the WTO accession has been guided by Deng Xiaoping's plea for self-restraint. As he reportedly said after the 1989 Tiananmen incident: "[W]atch and analyze developments calmly; secure our own positions; deal with change with confidence; conceal our capacities; be good at keeping a low profile; never become the leader."<sup>14</sup> To a large extent, the emphasis on "taoguang yanghui"—or what commentators have sometimes translated incompletely as "hide our strength and bide our time"<sup>15</sup>—explains the development of such notions as "peaceful rise" (*heping jueqi*) and "peace and development"<sup>16</sup> and the focus on constructing a harmonious, multipolar world.<sup>17</sup>

Nevertheless, recent years have seen China slowly moving toward greater engagement at both the regional and global levels. Some commentators even suggested that the current Chinese leadership has now moved away from, if not abandoned, the approach of "taoguang yanghui."<sup>18</sup> To highlight China's changing approach toward international engagement, this Part focuses on three notable developments that have enabled China to shape future international intellectual property norms.

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<sup>14</sup> See Teng Chung-chian, *Hegemony or Partnership: China's Strategy and Diplomacy Toward Latin America*, in CHINA AND THE DEVELOPING WORLD: BEIJING'S STRATEGY FOR THE TWENTY-FIRST CENTURY 84, 88 (Joshua Eisenman et al. eds., 2007) [hereinafter CHINA AND THE DEVELOPING WORLD] ("[W]atch and analyze developments calmly [*lengjing guancha*]; secure our own positions [*chenzhuo yingfu*]; deal with change with confidence [*wenzhu zhenjiao*]; conceal our capacities [*taoguang yanghui*]; be good at keeping a low profile [*shanyu shouzhuo*]; never become the leader [*juebu dantou*].").

<sup>15</sup> The phrase *taoguang yanghui* "is usually translated as 'hide our strength and bide our time', but literally means 'hide light, nurture obscurity'." MILLER, *supra* note 8, at 26; see also Verna Yu, "China Threat" Hangs on a Phrase, S. CHINA MORNING POST, Oct. 2, 2010, at 4 (discussing the controversy surrounding the oft-misinterpreted phrase "taoguang yanghui" in the context of China's foreign policy).

<sup>16</sup> Kurt M. Campbell, *Foreword* to CHINA AND THE DEVELOPING WORLD, *supra* note 14, at ix, x.

<sup>17</sup> See C. FRED BERGSTEN ET AL., CHINA: THE BALANCE SHEET: WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER 129 (2006) (discussing the notion of a "multipolar world" that China has promoted); HENRY KISSINGER, ON CHINA 500 (2011) (discussing the notion of a "harmonious world" that China has promoted).

<sup>18</sup> See Maximilian Mayer, *China's Rise as Eurasian Power: The Revival of the Silk Road and Its Consequences*, in RETHINKING SILK ROAD, *supra* note 8, at 1, 2 ("[A] new generation of leaders under President Xi Jinping has gradually abandoned Deng Xiaoping's principle of 'biding time while lying low.'"); Yu, *Rise of China*, *supra* note 11, at 436 ("China has now been slowly moving away from Deng Xiaoping's guidance that China should 'conceal [its] capacities' (*taoguang yanghui*) and 'be good at keeping a low profile' (*shanyu shouzhuo*).").

The first development concerns the establishment of bilateral and regional trade agreements, which China has actively developed since the early 2000s.<sup>19</sup> At the time of writing, China has established bilateral agreements with Chile, Pakistan, New Zealand, Singapore, Peru, Costa Rica, Iceland, Switzerland, South Korea, Australia, Georgia, and the Maldives.<sup>20</sup> With the ten members of the Association of Southeast Asian Nations (ASEAN), China also established the ASEAN–China Free Trade Area.<sup>21</sup>

Taken together, these agreements have shown not only China’s growing emphasis on intellectual property issues, but also its ability to play a more sophisticated FTA game.<sup>22</sup> For illustrative purposes, the China–Singapore Free Trade Agreement does not have a single intellectual property provision,<sup>23</sup> and the China–Pakistan Free Trade Agreement mentions the term “intellectual property” only twice—in relation to border measures and investment but not substantive protection.<sup>24</sup> By contrast, the China–New Zealand Free Trade Agreement contains an intellectual property chapter of close to 800 words.<sup>25</sup> The size of that chapter quickly doubled to more than

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<sup>19</sup> See sources cited *supra* note 5.

<sup>20</sup> Yu, *Half-Century of Scholarship*, *supra* note 1, at 1112.

<sup>21</sup> See Yu, *Sinic Trade Agreements*, *supra* note 5, at 1007–09 (discussing the establishment of the ASEAN–China Free Trade Area); see also Peter K. Yu, *The Incremental Development of the ASEAN–China Strategic Intellectual Property Partnership*, in *INTELLECTUAL PROPERTY LAW IN SOUTHEAST ASIA* (Christoph Antons & Michael Blakeney eds., forthcoming 2019) [hereinafter Yu, *ASEAN–China Strategic Partnership*] (discussing the ASEAN–China Free Trade Area in the intellectual property context). The ten members of ASEAN are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. *ASEAN Member Countries*, ASS’N SE. ASIAN NATIONS, <http://asean.org/asean/asean-member-states/> [<https://perma.cc/Z9ZP-U369>] (last visited Oct. 13, 2016).

<sup>22</sup> See Peter K. Yu, *Sinic Trade Agreements and China’s Global Intellectual Property Strategy*, in *INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS IN THE ASIA-PACIFIC REGION* 247, 265 (Christoph Antons & Reto M. Hilty eds., 2015) (noting the growing emphasis on intellectual property issues in China’s bilateral and regional FTAs).

<sup>23</sup> Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Singapore, China–Sing., Oct. 23, 2008.

<sup>24</sup> See Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Islamic Republic of Pakistan art. 10, China–Pak., Nov. 24, 2006 (laying down special requirements related to border measures); *id.* art. 46.1(d) (providing the coverage of the term “investment”).

<sup>25</sup> See Free Trade Agreement Between the Government of the People’s Republic of China and the Government of New Zealand ch. 12, China–N.Z., Apr. 7, 2008 (providing the intellectual property chapter).

1500 words in the China–Costa Rica Free Trade Agreement<sup>26</sup> and again doubled to more than 3000 words in the China–Switzerland Free Trade Agreement.<sup>27</sup> The latter agreement was the first Chinese FTA to include a detailed intellectual property chapter with a wide variety of provisions.<sup>28</sup>

The second development concerns the ongoing negotiation of the RCEP. Launched in November 2012, this partnership built on past trade and non-trade discussions between the ten ASEAN members and their six major Asia-Pacific neighbors (Australia, China, India, Japan, New Zealand, and South Korea).<sup>29</sup> Together, these sixteen countries “account for almost half of the world’s population, over 30 per cent of global [gross domestic product] and over a quarter of world exports.”<sup>30</sup> Upon establishment, the RCEP will cover not only China and India, but also two high-income Asian economies (Japan and South Korea). The pact will also feature six other countries that were involved in the negotiation of the Trans-Pacific Partnership<sup>31</sup> (TPP)—namely, Australia, Brunei Darussalam, Malaysia, New Zealand, Singapore, and Vietnam. Together with Japan, these six countries have now become members of the Comprehensive and Progressive Agreement for Trans-Pacific

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<sup>26</sup> See Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Costa Rica ch. 10, China–Costa Rica, Apr. 8, 2010 (providing the intellectual property chapter).

<sup>27</sup> See Free Trade Agreement Between the People’s Republic of China and the Swiss Confederation ch. 11, Switz.–China, July 6, 2013, (providing the intellectual property chapter).

<sup>28</sup> See Yu, *RCEP and Trans-Pacific Norms*, *supra* note 2, at 729–30 (discussing the expansive intellectual property chapter in the China–Switzerland Free Trade Agreement).

<sup>29</sup> *Id.* at 675.

<sup>30</sup> *Regional Comprehensive Economic Partnership*, DEP’T FOREIGN AFF. & TRADE (Austl.), <http://dfat.gov.au/trade/agreements/rcep/pages/regional-comprehensive-economic-partnership.aspx> [<https://perma.cc/7ZQX-TTMT>] (last visited Apr. 14, 2019) (Austl.).

<sup>31</sup> Trans-Pacific Partnership Agreement, Feb. 4, 2016, <https://ustr.gov/tradeagreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [<https://perma.cc/K8A3-CMW6>]. For the Author’s discussions of the TPP, see generally Peter K. Yu, *The ACTA/TPP Country Clubs*, in ACCESS TO INFORMATION AND KNOWLEDGE: 21ST CENTURY CHALLENGES IN INTELLECTUAL PROPERTY AND KNOWLEDGE GOVERNANCE 258 (Dana Beldiman ed., 2014) [hereinafter Yu, *ACTA/TPP Country Clubs*]; Yu, *Crossvergence*, *supra* note 2; Yu, *Copyright Normsetting*, *supra* note 2; Peter K. Yu, *Thinking About the Trans-Pacific Partnership (and a Mega-Regional Agreement on Life Support)*, 20 SMU SCI. & TECH. L. REV. 97 (2017) [hereinafter Yu, *Thinking About the TPP*]; Peter K. Yu, *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INT’L L.J. 1129 (2014).

Partnership<sup>32</sup> (CPTPP). Developed to replace the TPP Agreement following the United States' withdrawal,<sup>33</sup> the CPTPP was signed in Chile in March 2018 and has recently entered into force.<sup>34</sup>

Although the RCEP negotiations were established not solely as a reactive response or a defensive measure to the TPP negotiations,<sup>35</sup> the exclusion of China and other emerging countries in Asia from the TPP most certainly has accelerated the RCEP negotiations.<sup>36</sup> From China's standpoint, the preference for a

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<sup>32</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text> [<https://perma.cc/ZR93-E9DA>]; see also Yu, *Thinking About the TPP*, *supra* note 32, at 104–06 (discussing the CPTPP); *CPTPP vs TPP*, N.Z. MINISTRY FOREIGN AFF. & TRADE, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/cptpp-2/tpp-and-cptpp-the-differences-explained/> [<https://perma.cc/BP5A-PQ8X>] (last visited Apr. 14, 2019) (explaining the differences between the TPP and the CPTPP).

<sup>33</sup> See Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 23, 2017); see also Yu, *Thinking About the TPP*, *supra* note 32, at 101–10 (discussing the United States' withdrawal and its aftermath).

<sup>34</sup> See Ankit Panda, *The CPTPP Trade Agreement Will Enter into Force*, DIPLOMAT (Nov. 1, 2018), <https://thediplomat.com/2018/11/the-cptpp-trade-agreement-will-enter-into-force-on-december-30/> [<https://perma.cc/J4FJ-83GE>] (reporting Australia's ratification of the CPTPP).

<sup>35</sup> See Yu, *RCEP and Trans-Pacific Norms*, *supra* note 2, at 678 (“Although the RCEP negotiations were launched in November 2012—more than two years after the beginning of the TPP negotiations—they were not established solely as a reactive response to the latter.”).

<sup>36</sup> As I noted in an earlier article:

Although the ASEAN+6 leaders' joint declaration did not specifically mention the TPP, there is no denying that the development of this United States-led partnership has greatly accelerated the RCEP negotiations. The latter negotiations were particularly urgent when two major ASEAN+6 economies, China and India, were intentionally excluded from the TPP. Also excluded were other key ASEAN+6 members, such as Indonesia, the Philippines, South Korea, and Thailand.

Yu, *RCEP and Trans-Pacific Norms*, *supra* note 2, at 681–83; see also Du Ming, *Explaining China's Tripartite Strategy Toward the Trans-Pacific Partnership Agreement*, 18 J. INT'L ECON. L. 407, 424 (2015) (“After the USA introduced the TPP and several ASEAN members joined the TPP negotiations, ASEAN has been concerned that the USA might take away its leadership of Asian economic integration and marginalize the Association. ASEAN's proposal for forming the RCEP in 2012 was at least partially motivated by this concern.”); Shintaro Hamanaka, *Trans-Pacific Partnership Versus Regional Comprehensive Economic Partnership: Control of Membership and Agenda Setting* 13 (Asian Development Bank, Working Paper Series on Regional Economic Integration No. 146, 2014), [https://aric.adb.org/pdf/workingpaper/WP146\\_Hamanaka\\_Trans-Pacific\\_Partnership.pdf](https://aric.adb.org/pdf/workingpaper/WP146_Hamanaka_Trans-Pacific_Partnership.pdf) [<https://perma.cc/6L99-YY24>] (stating that, while China's dominant strategy “is to establish



regional pact in which the country can play some leadership role is easy to understand. As Shintaro Hamanaka explained:

[T]he formation of regional integration and cooperation frameworks can be best understood as a dominant state's attempt to create its own regional framework where it can exercise some exclusive influence. . . . For an economy that wants to increase its influence, establishing a regional group where it can be the most powerful state—dominating other members in terms of material capacity—is convenient. . . . By assuming [such] leadership, an economy can set a favorable agenda and establish convenient rules. In addition, the most powerful state can increase influence through prestige and asymmetric economic interdependence with others.<sup>37</sup>

Thus far, ASEAN+6 members have already entered into twenty-five rounds of negotiations.<sup>38</sup> Once the RCEP negotiations conclude, it is anticipated that the final text will cover a wide range of areas, including “trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition [and] dispute settlement.”<sup>39</sup> Beyond these areas, working or sub-working groups have also been established to address rules of origin; customs procedures and trade facilitation; legal and institutional issues; sanitary and phytosanitary measures; standards,

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a regional framework that does not include the United States so it can hold a dominant position,” Japan seems to have been “using the ‘PRC card’ to improve its TPP negotiation position vis-à-vis the United States”); Michael Wesley, *Who Calls the Tune? Asia Has to Dance to Duelling Trade Agendas*, CONVERSATION (Oct. 19, 2014), <https://theconversation.com/whocalls-the-tune-asia-has-to-dance-to-duelling-trade-agendas-32813> [<https://perma.cc/8MDH-K6KM>] (“For Beijing, RCEP is a defensive measure against the TPP. It is calculating that the lure of the size and dynamism of the Chinese economy will convince the region to opt for a more ‘Asianist’ grouping, rather than the TPP’s Pacific model, which threatens to divide Asia’s economic regionalism.”).

<sup>37</sup> Hamanaka, *supra* note 36, at 2 (footnote and citations omitted).

<sup>38</sup> See *Regional Comprehensive Economic Partnership: News*, DEP’T FOREIGN AFF. & TRADE, <http://dfat.gov.au/trade/agreements/rcep/news/Pages/news.aspx> [<https://perma.cc/T3XE-8LZM>] (last visited July 6, 2016) (Austl.) [hereinafter *RCEP News*].

<sup>39</sup> ASEAN Plus Six, Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership pmbl. (Aug. 30, 2012), <http://dfat.gov.au/trade/agreements/rcep/Documents/guiding-principles-rcep.pdf> [<https://perma.cc/2AC7-EU6W>] [hereinafter Guiding Principles].

technical regulations and conformity assessment procedures; electronic commerce; financial services; and telecommunications.<sup>40</sup>

Given this large number of working and sub-working groups, it remains to be seen whether their establishment will result in the creation of standalone chapters in each specific area. The *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership (Guiding Principles)* did mention specifically “the text on intellectual property in the RCEP.”<sup>41</sup> Knowledge Ecology International, a nongovernmental organization active in the intellectual property area, also leaked an early draft of the RCEP intellectual property chapter.<sup>42</sup> Although that draft was dated October 15, 2015 and has most certainly evolved following the United States’ withdrawal from the TPP and the CPTPP’s eventual suspension of select TPP provisions,<sup>43</sup> it will be very unlikely for the RCEP negotiating parties to abandon their plan to include an intellectual property chapter in their agreement.<sup>44</sup>

The last development is the most interesting yet also the most uncertain.<sup>45</sup> It concerns the slowly emerging BRI, which is the focus of this Article. Inspired by the Silk Road that dates back to two

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<sup>40</sup> See *RCEP News*, *supra* note 38 (reporting the formation of working and sub-working groups).

<sup>41</sup> See *Guiding Principles*, *supra* note 39, pt. V (“The text on intellectual property in the RCEP will aim to reduce [intellectual property]–related barriers to trade and investment by promoting economic integration and cooperation in the utilization, protection and enforcement of intellectual property rights.”).

<sup>42</sup> See *2015 Oct 15 Version: RCEP IP Chapter*, KNOWLEDGE ECOLOGY INT’L (Apr. 19, 2016), <http://keionline.org/node/2472> [<https://perma.cc/4VJQ-T5NL>] (providing the leaked October 15, 2015 text of the proposed RCEP intellectual property chapter).

<sup>43</sup> Although the CPTPP kept intact a large part of the original TPP intellectual property chapter, it suspended the more controversial intellectual property provisions, such as those covering copyright and patent terms, undisclosed test or other data, biologics, technological protection measures, and legal remedies and safe harbours. See Yu, *Thinking About the TPP*, *supra* note 32, at 105 (discussing the CPTPP’s suspension of select TPP provisions).

<sup>44</sup> See Peter K. Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, 50 VAND. J. TRANSNAT’L L. 673, 722 (2017) (“Absent any catastrophic developments in the RCEP negotiations, the investment in [the working group on intellectual property] is just too substantial for the [intellectual property] chapter to be abandoned at this late stage.”).

<sup>45</sup> See Lutz-Christian Wolff & Xi Chao, *Preface* to LEGAL DIMENSIONS, *supra* note 7, at xvii, xvii (“Despite the fact that its tremendous significance for local, regional and global developments is widely acknowledged the precise scope, aims and even the participating countries of the initiative are not yet clearly defined.”); see also Mayer, *supra* note 18, at 28 (“[T]he question how the [BRI] can be developed into a multilateral institution raises puzzles that put the Chinese elites’ creativity and tenacity to a hard test.”).

millennia ago<sup>46</sup> and aiming to rejuvenate the nation,<sup>47</sup> Chinese President Xi Jinping announced the construction of the land-based Silk Road Economic Belt at Nazarbayev University in Astana, Kazakhstan in September 2013.<sup>48</sup> This announcement was followed a month later by President Xi's introduction of the sea-based 21st-century Maritime Silk Road during a speech made at the Indonesian Parliament.<sup>49</sup> Together, the two new "Silk Roads" have now become the BRI, which many commentators have considered President Xi's "centrepiece of [his] 'proactive' foreign policy."<sup>50</sup> As the Chinese government declared in its guiding document entitled *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road (Vision and Actions)*:

Accelerating the building of the Belt and Road can help promote the economic prosperity of the countries along the Belt and Road and regional economic cooperation, strengthen exchanges and mutual learning between different civilizations, and promote world peace and development. It is a great undertaking that will benefit people around the world.<sup>51</sup>

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<sup>46</sup> "The ancient Silk Road started from Chang'an (now referred to as Xi'an), an ancient Chinese capital, which went through countries in Central Asia like Afghanistan, Iran, Iraq, Syria to reach the Mediterranean, and ends in Rome. The road ran 6,440 km." Zhang Yunling, *Belt and Road Initiative as a Grand Strategy*, in CHINA'S BELT AND ROAD INITIATIVES, *supra* note 8, at 3, 6.

<sup>47</sup> See MILLER, *supra* note 8, at 33 ("There is little doubt that President Xi sees the Belt and Road as a practical step towards realizing the strategic goal of national rejuvenation . . ."). As Tom Miller observed further:

President Xi's mission . . . to return China to what he regards as its natural, rightful and historical position as the greatest power in Asia . . . does not mean that China has to replace the US as the world's only superpower, but it does mean that Asia has to predominate in its own backyard.

*Id.* at 11.

<sup>48</sup> WANG, *supra* note 8, at 22.

<sup>49</sup> *Id.*

<sup>50</sup> MILLER, *supra* note 8, at 30; see also *id.* at 12 ("[The BRI] is Xi Jinping's signature policy, designed to secure his legacy."); Mayer, *supra* note 18, at 2 (describing the BRI as "the most ambitious foreign policy approach adopted by China thus far").

<sup>51</sup> VISION AND ACTIONS, *supra* note 9, preface.

Although a growing volume of literature has now slowly emerged to examine this new initiative,<sup>52</sup> especially within China,<sup>53</sup> it remains unclear how the initiative will affect the country and the world at large in the intellectual property area. Indeed, there has not been much discussion of the BRI in this area.<sup>54</sup> This lack of discussion is understandable, considering that the initiative has focused primarily on connectivity<sup>55</sup> and infrastructural development.<sup>56</sup>

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<sup>52</sup> See sources cited *supra* note 8.

<sup>53</sup> As Maximilian Mayer observed:

Within China . . . , the study of the [BRI] has developed into a cottage industry as the Chinese government initiated a broad academic debate and called for input from various domestic research institutes, think tanks, and universities in order to articulate a comprehensive policy based on Xi's earlier remarks. Over one hundred institutes have formed a special [BRI] think tank alliance. The massive increase in official funding began to impact the entire research landscape of Chinese academia.

Mayer, *supra* note 18, at 3 (footnote omitted). Professor Wang contrasted the different receptions of the BRI within and outside China:

Two years after its launch, B&R [Belt and Road] is beset with symptoms of being "hot inside and cold outside". Within the context of China, the inland provinces located along the B&R consider the B&R a massive opportunity for economic development. However, reactions are mixed in relation to the countries along the B&R.

Wang, *supra* note 8, at 96. *But see* Mayer, *supra* note 18, at 9 ("The [BRI] is, arguably, the first Chinese concept that has a lasting impact on international discourses.").

<sup>54</sup> See generally Lee, *supra* note 7 (discussing the BRI in the intellectual property context).

<sup>55</sup> See Nivedita Das Kundu, *Introduction to CHINA'S ONE BELT ONE ROAD*, *supra* note 8, at 1, 2 [hereinafter Kundu, *Introduction*] (stating that the BRI "can . . . be considered as a transnational connectivity model, as it aims to coordinate factors of economic circulation across different national spaces, with different governance models, legal norms and political contingencies"); Zhang, *supra* note 46, at 7 ("Connectivity are pillars of the Belt and Road strategy.").

<sup>56</sup> As the Chinese government declared in *Vision and Actions*:

Facilities connectivity is a priority area for implementing the Initiative. On the basis of respecting each other's sovereignty and security concerns, countries along the Belt and Road should improve the connectivity of their infrastructure construction plans and technical standard systems, jointly push forward the construction of international trunk passageways, and form an infrastructure network connecting all sub-regions in Asia, and between Asia, Europe and Africa step by step. At the same time, efforts should be made to promote green and low-carbon infrastructure construction and operation management, taking into full account the impact of climate change on the construction.

VISION AND ACTIONS, *supra* note 9, pt. IV; see also Alexander Demissie, *Special Economic Zones: Integrating African Countries in China's Belt and Road Initiative*, in RETHINKING

Nevertheless, the past few years have seen growing developments in the intellectual property area. In July 2016, the Chinese government co-organized with the World Intellectual Property Organization (WIPO) a two-day High Level Conference on Intellectual Property for Countries Along the “Belt and Road” in Beijing.<sup>57</sup> At that conference, State Councilor Wang Yong called on countries to “work together to prioritize IP [intellectual property] as a system to promote innovation and to share the benefits of innovation.”<sup>58</sup> He further noted that the BRI could provide assistance in four areas: “cooperation in IP-related services, harmonization of IP rules, inter-operability of databases, and joint human resources training.”<sup>59</sup>

In May 2017, China adopted the Agreement on Enhancing “Belt and Road” Intellectual Property Cooperation with WIPO.<sup>60</sup> The country also “signed memorandums of understanding on IP cooperation with a large number of countries including Tajikistan, Vietnam, Laos, the Philippines, Bangladesh, Kyrgyzstan, Kazakhstan, Armenia, Albania, Bulgaria, Latvia, Lithuania and Egypt.”<sup>61</sup> In addition, China “carried out extensive cooperation with [Belt and Road] countries in terms of IP education, publicity, training and information exchange.”<sup>62</sup> In August 2018, a second High Level Conference on Intellectual Property for Countries Along the “Belt

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SILK ROAD, *supra* note 8, at 69, 73–76 (discussing infrastructural development as a catalyst for industrialization and development); Li Xing, *China’s Pursuit of the “One Belt One Road” Initiative: A New World Order with Chinese Characteristics?*, in MAPPING CHINA’S OBOR INITIATIVE, *supra* note 8, at 1, 14 [hereinafter Li, *China’s Pursuit*] (“Infrastructure construction has become the ‘Chinese solution’ in promoting regional economic integration.”).

<sup>57</sup> Press Release, World Intellectual Prop. Org., High Level “Belt and Road” Conference Urges Closer IP Collaboration for Economic Growth (July 27, 2016), [http://www.wipo.int/about-wipo/en/offices/china/news/2016/news\\_0008.html](http://www.wipo.int/about-wipo/en/offices/china/news/2016/news_0008.html) [https://perma.cc/VS2C-Q9R7] [hereinafter Belt and Road Conference Release].

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Press Release, WIPO Director General Visits Belt and Road Forum and China Supreme People’s Court (May 18, 2017), [https://www.wipo.int/about-wipo/en/offices/china/news/2017/news\\_0001.html](https://www.wipo.int/about-wipo/en/offices/china/news/2017/news_0001.html) [https://perma.cc/LB9R-EC6R].

<sup>61</sup> Li You, *Intellectual Property in Focus at High-Level Forum in Beijing*, CHINA DAILY (Aug. 29, 2018), [http://www.chinadaily.com.cn/cndy/2018-08/29/content\\_36837702.htm](http://www.chinadaily.com.cn/cndy/2018-08/29/content_36837702.htm) [https://perma.cc/WUR5-N7RD] [hereinafter Li, *Intellectual Property in Focus*].

<sup>62</sup> *Id.*

and Road” was held in Beijing.<sup>63</sup> The event emphasized the BRI’s importance in the intellectual property area while exploring its many promises and challenges.<sup>64</sup>

When the developments surrounding China’s FTAs, the RCEP, and the BRI are taken together, they show the country’s increasing eagerness to assert itself in the international arena, including in matters involving intellectual property protection and enforcement. It will be too early to evaluate the full impact of this new approach toward international engagement, but the changing approach has certainly raised a number of interesting questions: Will this approach result in greater convergence or divergence of international and regional intellectual property norms?<sup>65</sup> Will the approach intensify the ongoing rivalry between intellectual property norm setters in Asia?<sup>66</sup> What impact will this approach have on the international intellectual property regime and the global community?<sup>67</sup>

## II. *Belt and Road Initiative*

Shortly after the BRI’s announcement, policymakers and commentators began to wonder about the initiative’s motives, logic,

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<sup>63</sup> Press Release, Nat’l Intellectual Prop. Admin. of China, The 2018 High-Level Conference on IP for Countries Along Belt and Road Highlights Inclusiveness, Development, Cooperation, Mutual Benefit (Aug. 29, 2018), <http://english.cnipa.gov.cn/specialtopic/tbar2018/tbar2018headlines/1131331.htm> [<https://perma.cc/N5MA-6NRS>].

<sup>64</sup> Press Release, Nat’l Intellectual Prop. Admin. of China, 2018 High-level Conference on Intellectual Property for Countries Along the Belt and Road Approaching (Aug. 27, 2018), <http://english.cnipa.gov.cn/specialtopic/tbar2018/tbar2018prb/1131291.htm> [<https://perma.cc/KH7J-FBYZ>] (stating that the conference “aim[ed] to exchange views on the new situation of international IP development at present, discuss IP problems confronting countries along the Belt and Road, and explore the vision of cooperation in the future”).

<sup>65</sup> See generally Yu, *Crossvergence*, *supra* note 2, at 278 (arguing that the RCEP negotiations will result in neither convergence nor divergence, but “crossvergence,” of regional intellectual property norms).

<sup>66</sup> See generally Yu, *Asian Norm Setters*, *supra* note 2 (discussing the rivalry between Asian intellectual property norm setters); Anupam Chander & Madhavi Sunder, *The Battle to Define Asia’s Intellectual Property Law: From TPP to RCEP*, 8 U.C. IRVINE L. REV. 331 (2018) (discussing the struggle between key RCEP negotiating parties over intellectual property rules).

<sup>67</sup> See generally Yu, *Copyright Normsetting*, *supra* note 2, at 42–45 (discussing the battle between the TPP, the CPTPP, and the RCEP); Yu, *Sinic Trade Agreements*, *supra* note 5, at 1018–27 (discussing “the battle of the FTAs”).

ramifications, and geographical reach.<sup>68</sup> Some even compared the BRI to the Chinese “Marshall Plan,” bringing to mind the United States–led reconstruction effort in Europe following the end of the Second World War.<sup>69</sup> It was not until the Chinese government’s release of *Vision and Actions* that analysis of the BRI began to concretize.<sup>70</sup> Even now, commentators remain deeply divided over the initiative’s overall benefits, potential drawbacks, and future impacts.

This Part does not aim to unravel the motive or logic behind the BRI. Nor does it seek to predict what this initiative will eventually become. In fact, this Article is comfortable with the possibility that we may never be able to pinpoint the initiative’s trajectory.<sup>71</sup> After all, the BRI remains a moving target, taking on

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<sup>68</sup> “The 65 countries along the Belt and Road account for 63 percent of the total population of the world, but their output only makes up 29 percent of the world’s total.” WANG, *supra* note 8, at 4; see Lutz-Christian Wolff, *China’s “Belt and Road” Initiative—An Introduction*, in LEGAL DIMENSIONS, *supra* note 7, at 1, 7 [hereinafter Wolff, *Introduction*] (“It now seems to be commonly accepted that in addition to China there are altogether 64 B&R countries.”); see also *id.* at 8–19 (providing information about the BRI countries); WANG, *supra* note 8, at 76–77 (providing a classification of the 64 countries involved in the BRI).

<sup>69</sup> See Li, *China’s Pursuit*, *supra* note 56, at 13 (discussing how the BRI has been “driven by a number of political, economic and security-related logics similar to those upon which the Marshall Plan was initiated”); WANG, *supra* note 8, at 39–44 (explaining how the BRI, “while not being a Chinese Marshall Plan, has gone beyond the level of the Marshall Plan”); Yang Minghong, *Understanding the One Belt One Road Initiative: China’s Perspective*, in CHINA’S ONE BELT ONE ROAD, *supra* note 8, at 7, 10–13 (discussing whether the BRI is the Chinese version of the Marshall Plan); see also David J. Lynch, *World Bank Touts Global Stimulus Plan*, USA TODAY, Feb. 10, 2009, at 4B (reporting Justin Lin’s call for the establishment of a “global recovery fund in the spirit of the Marshall Plan” when he was the World Bank’s chief economist). But see Tim Summers, *Rocking the Boat? China’s “Belt and Road” and Global Order*, in CHINA’S PRESENCE IN MIDDLE EAST, *supra* note 8, at 24, 33 (“[N]umerous Chinese scholars have sought to rebut analysis that compares the belt and road initiative with the post-war Marshall Plan for Europe as [a] way of cementing China’s geopolitical influence.” (footnote omitted)); see also Mayer, *supra* note 18, at 7 (noting that Chinese Foreign Minister Wang Yi “dismiss[ed] a comparison between the [BRI] and the U.S. Marshall Plan”).

<sup>70</sup> VISION AND ACTIONS, *supra* note 9.

<sup>71</sup> Commentators have identified multiple reasons behind the BRI’s potential success. Professor Mayer provided four reasons:

First, the proposal was advanced by president Xi, the strongest leader of the Chinese Communist Party . . . since Deng Xiaoping. Xi has sufficient political capital and bureaucratic strength to substantially carry out the initiative that also became enshrined in the 13th Five-Year Plan. Second, the uptake in many other countries is much stronger than anticipated. China’s economic vision to improve Eurasian connectivity resonates with many, especially against the background of anti-

new values, meanings, and contents as policymakers develop new ways to implement this initiative. To some extent, the BRI's lack of concrete policy formulation has been a blessing in disguise. For an area such as intellectual property, having a mostly blank canvas can be highly appealing.

To enhance our understanding of the BRI, this Part focuses on five distinct areas of inquiry: (1) the nature of this initiative; (2) its core objectives; (3) its potential disruption to existing multilateral and regional institutions; (4) its overall inclusiveness; and (5) the various responses it will elicit. Greater inquiry in these five areas will shed light on not only the BRI's ongoing status, but also its future evolution.

The first inquiry concerns the nature of the BRI. Initially, commentators debated whether this initiative is a vision,<sup>72</sup> a catchy slogan,<sup>73</sup> an experiment,<sup>74</sup> or a "grand strategy."<sup>75</sup> By now, it is quite

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globalization agenda of the Trump administration. . . . Third, a failure of this ambitious project would severely weaken China's soft power and jeopardize its global leadership claim. The Chinese leaders, thus, have a powerful incentive to keep the [BRI] working at almost any cost. Finally, and most importantly, the government has articulated a convincing *domestic* rational[e] for the [BRI] . . . which keeps in check internal critical voices that question the risky use of taxpayer money abroad.

Mayer, *supra* note 18, at 8–9 (footnotes omitted).

<sup>72</sup> See Niv Horesh, *Introduction: China's One Belt, One Road Vision—Implications for the Middle East*, in CHINA'S PRESENCE IN MIDDLE EAST, *supra* note 8, at 1, 1 (referring to the "One Belt, One Road vision"); Wolff, *Introduction*, *supra* note 68, at 4 ("B&R has . . . been referred to as 'a vision' and 'little more than a buzz word'").

<sup>73</sup> See Horesh, *supra* note 72, at 1 ("Others have concluded that B&R is 'far more than a slogan', but still 'a small phrase with big ambitions.'" (footnote omitted)); Mayer, *supra* note 18, at 8 ("[O]bservers call into question the strategic maturity of the Belt and Road because it could be seen as yet another in a series of political slogans (*zhengzhi kouhao*) over the last two decades.").

<sup>74</sup> See Mayer, *supra* note 18, at 11 ("[The BRI] can be seen as an 'experimental' approach that tests how to connect domestic with international economic processes to guarantee China's continued growth." (footnote omitted)).

<sup>75</sup> See *id.* at 2 ("[T]he idea of engineering a revival of the ancient Silk Road marks a turning point in the debates about China's strategy."); WANG, *supra* note 8, at 20 ("[T]he Belt and Road Initiative is not just a path option to realize the Chinese Dream, but also a strategic plan to enhance a rising power's voice . . ."); Zhang, *supra* note 46, at 6–8 (discussing the BRI as a "grand strategy"). But see Kundu, *Introduction*, *supra* note 55, at 2 ("The thinking behind the 'Belt' and 'Road' strategy as defined by Chinese government is an 'initiative' and not as a 'plan' or 'strategy'."). MILLER, *supra* note 8, at 30 ("Beijing is adamant that [the BRI] should not be called a 'plan' or a 'strategy', lest it be interpreted as a ruse to build a vast economic empire."); Yang, *supra* note 69, at 7 ("The use of the word 'strategy' suggests that China wants to pursue the benefits of the Belt and Road Initiative



clear that the BRI is an initiative, as its name suggests. As the Chinese government stated in *Vision and Actions*, this initiative is “a systematic project” seeking to “integrate the development strategies of the countries along the Belt and Road.”<sup>76</sup> To complicate matters, the initiative, like the Silk Road that provided its inspiration, will likely evolve over a long period of time.<sup>77</sup> As Wang Yiwei, the author of a highly comprehensive monograph on the BRI, recounted the gradual and sprawling development of the ancient maritime Silk Road:

The history of the ancient maritime Silk Road can . . . be dated back to more than 2,000 years, when people in the Han Dynasty opened the maritime route to India through Southeast Asia. The Tang Dynasty (618–907) turned the focus of foreign trade from the land route to the sea route. The Song Dynasty (960–1279) and Yuan Dynasty (1271–1368) encouraged Arabian businessmen to trade in cities such as Guangzhou and Quanzhou, so that coverage has been expanded to the Persian Gulf and the coastal areas of Arabia through the Indian Ocean, rather than just to South India through Southeast Asia. The Ming Dynasty (1368–1644) opened a route for trade using sailing vessels starting from Manila to Mexico’s Acapulco, through which Chinese silk and silk products carried to Manila by Chinese commercial ships were shipped across the Pacific Ocean to the American Continent, and then to European countries across the Atlantic Ocean.<sup>78</sup>

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exclusively from the perspective of its own national interests and it is even a game strategy targeting certain countries.”).

<sup>76</sup> VISION AND ACTIONS, *supra* note 9, preface; *see also* Kundu, *Introduction*, *supra* note 55, at 1, 2 (“The debate on the [BRI] by China focuses on and anticipates possible policy convergence between China and other Sovereign national governments along the road.”).

<sup>77</sup> *See* Yang, *supra* note 69, at 13 (noting the view of a senior adviser to the United States Energy Security Council that “the ‘Belt and Road’ Initiative is not a temporary plan, but will involve one and more generations and can even go beyond the century”).

<sup>78</sup> WANG, *supra* note 8, at 31; *see also* Anastas Vangeli, *A Framework for the Study of the One Belt One Road Initiative as a Medium of Principle Diffusion*, in MAPPING CHINA’S OBOR INITIATIVE, *supra* note 8, at 57, 61 (“The [BRI] is a concept ‘with Chinese characteristics’, meaning that it is being developed incrementally, and with a long-term

The second inquiry pertains to the BRI's core objectives. The Chinese government's guiding document explicitly identified a number of priority objectives:

The Belt and Road Initiative aims to promote the connectivity of Asian, European and African continents and their adjacent seas, establish and strengthen partnerships among the countries along the Belt and Road, set up all-dimensional, multi-tiered and composite connectivity networks, and realize diversified, independent, balanced and sustainable development in these countries. The connectivity projects of the Initiative will help align and coordinate the development strategies of the countries along the Belt and Road, tap market potential in this region, promote investment and consumption, create demands and job opportunities, enhance people-to-people and cultural exchanges, and mutual learning among the peoples of the relevant countries, and enable them to understand, trust and respect each other and live in harmony, peace and prosperity.<sup>79</sup>

The document further called on countries along the Belt and Road to "promote policy coordination, facilities connectivity, unimpeded trade, financial integration and people-to-people bonds as their five major goals."<sup>80</sup> In addition to these five goals, close observers of the BRI have identified additional objectives to the benefit of China, the initiative's initiator:

- respond to global economic crisis;<sup>81</sup>
- facilitate opening-up;<sup>82</sup>

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outlook, and it is a concept that demonstrates the converse between different foreign policy initiatives and China's domestic development.").

<sup>79</sup> VISION AND ACTIONS, *supra* note 9, pt. I.

<sup>80</sup> *Id.* pt. IV; *see also* WANG, *supra* note 8, at 168–74 (discussing these five goals).

<sup>81</sup> *See* WANG, *supra* note 8, at 26 (discussing the BRI as "a way for global economic growth in the post-financial crisis era").

<sup>82</sup> *See* VISION AND ACTIONS, *supra* note 9, at pt. I ("China will stay committed to the basic policy of opening-up, build a new pattern of all-round opening-up, and integrate itself deeper into the world economic system."); Wan Ziqiang & Li Shanmin, *National Economic Security and the "Belt and Road" Initiative*, in LEGAL DIMENSIONS, *supra* note 7, at 261, 267 ("The B&R is . . . an important platform to jumpstart a new round of reforms and opening up."); WANG, *supra* note 8, at 3 ("The Belt and Road construction has shaped

- provide a new source of economic growth;<sup>83</sup>
- reduce excess production capacity;<sup>84</sup>
- promote outbound investment;<sup>85</sup>
- foster development of central and western provinces;<sup>86</sup>
- improve the country's global competitiveness;<sup>87</sup>

China's new strategic pattern of all-round opening-up . . ."); Yang, *supra* note 69, at 8 ("Internally, the 'Belt and Road' Initiative is a new strategy that China adopts to further promote opening up.").

<sup>83</sup> As Tom Miller explained:

Beijing's great hope is that state commodity producers, engineering firms and capital good makers will find a lucrative new market of growth. The Belt and Road will require billions of tonnes of steel and cement, hundreds of thousands of workers, thousands of cranes and diggers, and dozens of new dams, power stations, and electricity grids.

MILLER, *supra* note 8, at 31–32.

<sup>84</sup> See *id.* at 32 ("Beijing views the [BRI] as a lifeline for indebted firms suffering from weak demand at home and looking to export their overcapacity."); Li, *China's Pursuit*, *supra* note 56, at 8 ("The ultimate goal of the [BRI] is often interpreted as a way to redirect the country's domestic overcapacity and capital for regional infrastructure development in order to . . . continue to keep Chinese industry and production robust, and . . . to maintain a low unemployment rate through retaining an acceptable GDP growth rate."); Yang, *supra* note 69, at 14–15 (exploring whether the BRI will help China transfer excess capacity). But see MILLER, *supra* note 8, at 49–50 (questioning the potential of the BRI to "absorb China's industrial overcapacity").

<sup>85</sup> See VISION AND ACTIONS, *supra* note 9, at pt. IV ("We . . . encourage Chinese enterprises to participate in infrastructure construction in other countries along the Belt and Road, and make industrial investments there."); Mayer, *supra* note 18, at 10 ("China's own economy that is increasingly slowing down would benefit from massive infrastructure construction projects and outward foreign direct investments, pushing forward structural adjustment, economic reforms, industrial upgrading, and regional development within China."); MILLER, *supra* note 8, at 32 ("[The BRI] is China's second big overseas investment push, following the 'Go Out' policy launched by Jiang Zemin in 1999."); WANG, *supra* note 8, at 16 ("In terms of the essence of opening-up the strategy has gradually been turned from 'bringing in' to 'going global,' and the integration of these two strategies has been deepened."). For discussions of the BRI in relation to outbound investment, see generally Vivienne Bath, "One Belt, One Road" and Chinese Investment, in LEGAL DIMENSIONS, *supra* note 7, at 165; Henry Ningning Huang & Terri Chenyue Tian, "One Belt, One Road" and China's Outbound Investment Regime, in LEGAL DIMENSIONS, *supra* note 7, at 139.

<sup>86</sup> See VISION AND ACTIONS, *supra* note 9, preface (noting the need to "create strategic propellers for hinterland development"); Mayer, *supra* note 18, at 12 ("The economic conditions in Central and Western provinces are another major concern in the Chinese capital."); Andrew Scobell, *Why the Middle East Matters to China*, in CHINA'S PRESENCE IN MIDDLE EAST, *supra* note 8, at 9, 18–19 (discussing the BRI as a policy to rebalance internal economic development).

<sup>87</sup> See Wan & Li, *supra* note 82, at 267 ("The B&R is a major strategic initiative for China, as it strives to gain long-term international and comparative advantages."); WANG, *supra* note 8, at 18 (discussing how the BRI will improve China's competitiveness by enhancing its comparative advantage).

- internationalize *renminbi*, the Chinese currency;<sup>88</sup>
- divert trade;<sup>89</sup>
- enable strategic cooperation;<sup>90</sup>
- alleviate concerns from neighbors;<sup>91</sup>
- launch the “charm offensive”;<sup>92</sup> and

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<sup>88</sup> See VISION AND ACTIONS, *supra* note 9, at pt. IV (“We will support the efforts of governments of the countries along the Belt and Road and their companies and financial institutions with good credit-rating to issue Renminbi bonds in China.”); Mayer, *supra* note 18, at 13 (noting as a domestic driver “the internationalization of the Renminbi”); Yuan Feng, *The One Belt One Road Initiative and China’s Multilayered Multilateralism*, in MAPPING CHINA’S OBOR INITIATIVE, *supra* note 8, at 91, 96 (considering the “[i]nternationalization of the Chinese currency” as a goal of the BRI). See generally Chen Weitseng, *Size Matters? Renminbi Internationalization and the Beijing Consensus*, in THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT 144 (Chen Weitseng ed., 2017) (discussing China’s efforts to internationalize renminbi); Shen Wei, *The “One Belt, One Road” Initiative, the Renminbi Internationalisation Strategy and Neo-global Financial Governance*, in LEGAL DIMENSIONS, *supra* note 7, at 305 (discussing the BRI as a renminbi internationalization strategy).

<sup>89</sup> See Li, *China’s Pursuit*, *supra* note 56, at 8 (“Externally, the goal [of the BRI] is to continue to pave the way for the transmission of Chinese goods and services to new markets and to improve trade and other relations with Southeast Asia, Central Asia and the European countries.”); MILLER, *supra* note 8, at 31 (noting that the BRI enables China to “diversify energy supplies”); Yuan, *supra* note 88, at 97 (considering as a goal of the BRI to provide a “[g]uarantee of China’s energy supply”). See generally Gonzalo Villalta Puig, *Unimpeded Trade? The Significance of Free Trade Areas to the Belt and Road Initiative of the People’s Republic of China*, in LEGAL DIMENSIONS, *supra* note 7, at 103, 107 (discussing the BRI in the context of stated goal of “unimpeded trade”).

<sup>90</sup> See WANG, *supra* note 8, at 57–64, 71–77 (discussing the opportunities for regional cooperation and global development).

<sup>91</sup> See MILLER, *supra* note 8, at 33 (noting that the BRI “lays out a strategic vision for turning China into the primary global engine of economic development, rooted in the understanding that China’s security interests are best served by tying other countries into ever closer trade and investment relationships”). For discussions of the so-called China threat, see generally CHINA’S FUTURE: CONSTRUCTIVE PARTNER OR EMERGING THREAT (Ted Galen Carpenter & James A. Dorn eds., 2000); BILL GERTZ, THE CHINA THREAT: HOW THE PEOPLE’S REPUBLIC TARGETS AMERICA (2000); STEVEN M. MOSHER, HEGEMON: CHINA’S PLAN TO DOMINATE ASIA AND THE WORLD (2000); PETER NAVARRO, THE COMING CHINA WARS: WHERE THEY WILL BE FOUGHT AND HOW THEY CAN BE WON (2007); PETER NAVARRO & GREG AUTRY, DEATH BY CHINA: CONFRONTING THE DRAGON—A GLOBAL CALL TO ACTION (2015).

<sup>92</sup> See generally JOSHUA KURLANTZICK, CHARM OFFENSIVE: HOW CHINA’S SOFT POWER IS TRANSFORMING THE WORLD (2007) (advancing the “charm offensive” thesis); see also THOMAS LUM ET AL., CONG. RESEARCH SERV., RL 34310, CHINA’S “SOFT POWER” IN SOUTHEAST ASIA (2008) (discussing China’s growing use of soft power in Southeast Asia). But see Dragan Pavličević, *A Power Shift Underway in Europe? China’s Relationship with Central and Eastern Europe Under the Belt and Road Initiative*, in MAPPING CHINA’S OBOR INITIATIVE, *supra* note 8, at 249, 264–66 (discussing China’s lack of soft power capabilities in Asia).

- consolidate regional leadership.<sup>93</sup>

Although we may never know for sure which of the abovementioned objectives are the key foci of those leaders and policymakers driving the BRI, the existence of these myriad objectives does suggest that this initiative will develop in multiple directions in the future and will involve many different countries and cultures at the same time.<sup>94</sup>

The third inquiry relates to the ongoing and future participation of the BRI. As the Chinese government stated clearly in *Vision and Actions*:

The Initiative is open for cooperation. It covers, but is not limited to, the area of the ancient Silk Road. It is open to all countries, and international and regional organizations for engagement, so that the results of the concerted efforts will benefit wider areas.

The Initiative is harmonious and inclusive. It advocates tolerance among civilizations, respects the paths and modes of development chosen by different countries, and supports dialogues among different civilizations on the principles of seeking common ground while shelving differences and drawing on each other's strengths, so that all countries can coexist in peace for common prosperity.<sup>95</sup>

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<sup>93</sup> See *Development Finance in Asia: U.S. Economic Strategy amid China's Belt and Road: Hearing Before the Subcomm. on Asia and the Pacific of the H. Comm. on Foreign Affairs*, 115th Cong. 22 (2017) (statement of Roy Kamphausen, Senior Vice President for Research, The National Bureau of Asian Research) ("[The BRI] is an instrument to consolidate China's position at the heart of Eurasia, in a space where U.S. influence is rather limited. The initiative is intended to counter what Beijing perceives as the U.S.'s unacceptable containment of China off of its eastern seaboard."); MILLER, *supra* note 8, at 31 ("China wants to create a network of economic dependency that will considerate its regional leadership, enable it to hedge against the United States' alliance structure in Asia, and diversify energy supplies.").

<sup>94</sup> See WANG, *supra* note 8, at 43 (noting that the BRI "embodies the 'many to many' cooperation model among countries along the Belt and Road").

<sup>95</sup> VISION AND ACTIONS, *supra* note 9, pt. II. Offering the Chinese perspective, Professor Wang concurred:

The Belt and Road Initiative stresses that China will never engage in unilateralism, nor will it impose its will on others. The initiative welcomes countries along the routes to directly and clearly state their development advantages and needs, and supports these countries' efforts to enhance their capability for independent innovation, and achieve different cooperation through frank communication. Despite the fact that

The document mentioned three times the “Silk Road Spirit,” which is the shorthand for “peace and cooperation, openness and inclusiveness, mutual learning and mutual benefit.”<sup>96</sup> To a large extent, the BRI provides a sharp contrast to the club-based exclusive approach taken by the negotiators of the Anti-Counterfeiting Trade Agreement<sup>97</sup> (ACTA), the TPP, and the CPTPP.<sup>98</sup> Compared to the negotiations of these three instruments, the BRI’s inclusiveness is likely to be quite similar to that of the RCEP.<sup>99</sup> Principle 6 of the *Guiding Principles* stated that “[t]he RCEP agreement will . . . have an open accession clause to enable the participation of any ASEAN FTA partner that did not participate in the RCEP negotiations and any other external economic partners after the completion of the RCEP negotiations.”<sup>100</sup>

The fourth inquiry concerns the BRI’s impact at the multilateral and regional levels. Thus far, a key concern about the

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the intuitive was proposed by China, during the construction process, China can still choose not to take the leadership, and uphold consultation on an equal footing so as to guarantee the rationality and feasibility of related programs.

WANG, *supra* note 8, at 140–41; *see also id.* at 179 (“To carry the spirit of the Silk Road, there should be respect for the development options of other cultures and countries.”); Jian Junbo, *Africa in the Maritime Silk Road: Challenges and Prospects*, in *RETHINKING SILK ROAD*, *supra* note 8, at 99, 111 (“Beijing should insist on a ‘dialogue of civilizations’ with African countries, in lieu of a ‘clash of civilizations.’”); Yang, *supra* note 69, at 17 (“[T]o jointly build the Belt and Road Initiative, Chinese government abandoned the idea that the coordination means you accept China’s plan or vice versa and stresses finding common grounds and cooperation fields on the basis of mutual respect and then jointly make plans.”).

<sup>96</sup> VISION AND ACTIONS, *supra* note 9, preface.

<sup>97</sup> Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011, 50 I.L.M. 243 (2011) [hereinafter ACTA]. For the Author’s discussions of the Anti-Counterfeiting Trade Agreement, see generally Peter K. Yu, *The ACTA Committee*, in *THE PLURILATERAL ENFORCEMENT AGENDA: THE GENESIS AND AFTERMATH OF ACTA* 142 (Pedro Roffe & Xavier Seuba eds., 2014); Yu, *ACTA/TPP Country Clubs*, *supra* note 31; Peter K. Yu, *ACTA and Its Complex Politics*, 3 WIPO J. 1 (2011); Peter K. Yu, *Enforcement, Enforcement, What Enforcement?*, 52 IDEA 239 (2012) [hereinafter Yu, *What Enforcement?*]; Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975 (2011).

<sup>98</sup> For discussions of this approach, see generally Daniel Gervais, *Country Clubs, Empiricism, Blogs and Innovation: The Future of International Intellectual Property Norm Making in the Wake of ACTA*, in *TRADE GOVERNANCE IN THE DIGITAL AGE: WORLD TRADE FORUM* 323 (Mira Burri & Thomas Cottier eds., 2012); Yu, *ACTA/TPP Country Clubs*, *supra* note 31.

<sup>99</sup> See Julien Chaisse & Mitsuo Matsushita, *China’s “Belt and Road” Initiative—Mapping the World’s Normative and Strategic Implications*, 52 J. WORLD TRADE 163, 185 (2018) (stating that the BRI may eventually grow into “an open [legal] framework or forum, and therefore . . . a different creature from today’s FTAs”).

<sup>100</sup> *Guiding Principles*, *supra* note 39, Principle 6.

initiative is its potential disruption to the existing multilateral and regional regulatory systems,<sup>101</sup> including those involving WIPO and the WTO.<sup>102</sup> Although the Chinese government's guiding document stated clearly that the initiative "will abide by . . . international norms"<sup>103</sup> and will rely on the success of the existing multilateral

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<sup>101</sup> See Huang Yunsong, *China-India in the Context of One Belt One Road: Divergences and Concerns*, in CHINA'S ONE BELT ONE ROAD, *supra* note 8, at 27, 28 ("It is . . . quite necessary to examine at macro-level on [the BRI's] possible impact upon the existing world order . . ."); Mayer, *supra* note 18, at 17–21 (discussing the "[g]eoeconomic and [i]nstitutional [r]egional [t]ransformation" brought about by the BRI); Summers, *supra* note 69 (exploring whether the BRI would challenge the existing global order); Wang Chuanxing, *Changing International System Structures and the Belt and Road Initiative*, in RETHINKING SILK ROAD, *supra* note 8, at 269, 275–78 [hereinafter Wang, *Changing International System Structures*] (discussing the complexities of the BRI's impact on international system structures).

<sup>102</sup> See Puig, *supra* note 89, at 107 ("While [China] should work with Belt and Road Initiative participant customs territories in an attempt to advance multilateral trade negotiations through the WTO, [the country] should, nevertheless, accept that the WTO no longer functions as an effective forum for trade liberalisation."); Yang, *supra* note 69, at 25 (noting that the BRI "will not replace nor could replace the practicing international trade rules").

<sup>103</sup> VISION AND ACTIONS, *supra* note 9, pt. II. The Chinese government's guiding document further stated:

The Belt and Road Initiative is in line with the purposes and principles of the UN Charter. It upholds the Five Principles of Peaceful Coexistence: mutual respect for each other's sovereignty and territorial integrity, mutual non-aggression, mutual non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence.

*Id.* As two commentators observed:

According to most Chinese scholars' view, in the process of converting ideas into action, MSR [the 21st Century Maritime Silk Road] needs to be guided, promoted, and safeguarded by international law. In turn, some argue that to eventually build the MSR greatly depends on the ability of China to shape, formulate, and implement cooperation based on international law. Therefore, China should carefully study the international law relevant to MSR in order to resolve the actual challenges of "maritime connectivity."

Zhang Guobin & Long Yu, *Connectivity and International Law in the 21st Century Maritime Silk Road*, in RETHINKING SILK ROAD, *supra* note 8, at 57, 58; see also Björn Ahl, *China's New Global Presence and Its Position Towards Public International Law: Obeying, Using or Shaping?*, in LEGAL DIMENSIONS, *supra* note 7, at 481 (discussing the compliance with public international law and human rights treaties in the BRI context); Lee Jaemin, *The Belt and Road Initiative Under Existing Trade Agreements: Some Food for Thought on a New Regional Integration Scheme*, in INTERNATIONAL GOVERNANCE, *supra* note 8, at 59 (discussing ways to implement the BRI in a manner consistent with China's obligations under existing international trade and investment agreements); Wang Heng, *China's Approach to the Belt and Road Initiative*, 22 J. INT'L ECON. L. 29 (2019) (outlining the approach China has taken to establish the BRI).

regulatory system,<sup>104</sup> the recent development of the RCEP, the New Development Bank, and the Asian Infrastructure Investment Bank suggests that the BRI could complicate, if not undermine, those existing multilateral and regional institutions that the United States and Europe helped create and from which they benefit.<sup>105</sup> The analysis will become even more complicated when one takes into account the statement in *Vision and Actions* that the BRI “is a positive endeavor to seek new models of international cooperation and global governance.”<sup>106</sup> Even if the BRI does not disrupt existing multilateral and regional institutions, it could alter or supplement them.<sup>107</sup> The

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<sup>104</sup> See VISION AND ACTIONS, *supra* note 9, pt. I (“The initiative to jointly build the Belt and Road . . . is designed to uphold the global free trade regime and the open world economy in the spirit of open regional cooperation.”); *id.* pt. V (“We should enhance the role of multilateral cooperation mechanisms, make full use of existing mechanisms . . . to strengthen communication with relevant countries, and attract more countries and regions to participate in the Belt and Road Initiative.”); see also Shi Jingxia, *The Belt and Road Initiative and International Law: An International Public Goods Perspective*, in INTERNATIONAL GOVERNANCE, *supra* note 8, at 9, 30 (“Whatever the international legal mechanisms chosen to safeguard BRI implementation, it should be emphasized that China does not intend the BRI to replace the existing mechanisms and institutions of regional and international cooperation”). One commentator observed:

[The BRI] relies on the existing multi-lateral mechanism between China and relevant countries and borrows the existing and effective regional cooperation platforms with the aim of holding high the banner of peaceful development, proactively developing economic and cooperative partnership with countries along the road reviving the ancient silk road, cooperatively building the communities of common interests, common destiny and common responsibilities featuring political mutual trust, economic integration and cultural tolerance.

Yang, *supra* note 69, at 8.

<sup>105</sup> See MILLER, *supra* note 8, at 37 (noting Washington’s fear that China “was trying to provide an alternative to the US-dominated system of global development finance, enshrined at Bretton Woods, which could reshape the economic architecture of Asia”); SHAMBAUGH, *supra* note 10, at 162–63 (“Through [the BRI], China is meticulously constructing an alternative and parallel global institutional architecture to the postwar western order.”); see also Mayer, *supra* note 18, at 4 (“Though the new funding mechanisms and institutions established by China fall short of challenging the principles and practices underpinning the Bretton Woods system, China has gained more influence, especially in the Eurasian regional financial order.”).

<sup>106</sup> VISION AND ACTIONS, *supra* note 9, pt. I; see also Mayer, *supra* note 18, at 5 (“[T]he ambitions of the [BRI] coupled with a ‘new model of international relations’ promoted by Beijing are a strong signal that China is no longer a status quo power and has begun to actively rebuild the world order.”); WANG, *supra* note 8, at 27–28 (discussing the BRI as a way to “[c]reate a new model for regional cooperation in the 21st century”).

<sup>107</sup> See MILLER, *supra* note 8, at 12 (noting that Beijing’s willingness to support the BRI with new financial institutions such as the Asian Infrastructure Investment Bank and the Silk Road Fund “does not mean that China is rejecting the global architecture, . . . [b]ut it does mean that [Beijing] wants to supplement and reshape [that architecture]”); Wang, *Changing*



more disruption this initiative will cause, the more tensions and conflicts will ensue.

The final inquiry involves the responses that the BRI will elicit from other countries, both along and away from the Belt and Road. To a large extent, the initiative has greatly intensified the rivalry between China and other major powers in the Asia-Pacific region and along the Belt and Road. Given this escalating rivalry, it remains to be seen how these powers will respond to the growing effort on the part of China and its neighbors to develop the BRI.<sup>108</sup> While the Trump administration has steered the United States away from the Obama administration's "pivot to Asia,"<sup>109</sup> active development along the Belt and Road will certainly raise questions about the changing power structure within the region or the global community.<sup>110</sup> Viewed as a zero-sum game,<sup>111</sup> the initiative's success could also undermine the efforts of other major powers in the

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*International System Structures*, *supra* note 101, at 277 (discussing China's effort "to establish supplementary international institutions"); Yang, *supra* note 69, at 25 (noting that the BRI "is only a supplement and improvement to the current international economic and financial order").

<sup>108</sup> Cf. MILLER, *supra* note 8, at 240 ("Beijing hopes the incentive of massive infrastructure investment will persuade Asian countries to put these economic interests above security concerns.").

<sup>109</sup> See generally KURT M. CAMPBELL, *THE PIVOT: THE FUTURE OF AMERICAN STATECRAFT IN ASIA* (2016) (discussing the Obama Administration's "pivot to Asia").

<sup>110</sup> A key impact of the BRI is its ability to "shift the center of geopolitical gravity away from the U.S. and back to Eurasia." WANG, *supra* note 8, at 68; see also *id.* at 65–70 (discussing the opportunity for Europe to change the world); Mayer, *supra* note 18, at 27 ("China's great power identity and consequently its rhetoric and policies will increasingly oscillate between a Pacific (Sino-U.S. axis) and a Eurasian (Sino-Russian axis) orientation."); Wolfgang Röhr, *Berlin Looking Eastward: German Views of and Expectations from the New Silk Road*, in *RETHINKING SILK ROAD*, *supra* note 8, at 227, 234 ("Perhaps the most exciting and difficult question for Germany is whether the ultimate prize coveted by the Silk Road initiative is not Asia or Africa, but Europe").

<sup>111</sup> A good example of the zero-sum game mentality is President Obama's declaration at the conclusion of the TPP negotiations in Atlanta in October 2015: "When more than 95 percent of our potential customers live outside our borders, we can't let countries like China write the rules of the global economy. We should write those rules, opening new markets to American products while setting high standards for protecting workers and preserving our environment." *Statement by the President on the Trans-Pacific Partnership*, WHITE HOUSE (Oct. 5, 2015), <https://www.whitehouse.gov/the-press-office/2015/10/05/statement-president-trans-pacific-partnership> [<https://perma.cc/EWQ6-WX8G>].

Asia-Pacific region,<sup>112</sup> such as the United States,<sup>113</sup> Japan,<sup>114</sup> and India.<sup>115</sup> As with any significant initiatives within this region, the BRI will raise serious questions about not only the initiative's impact on the existing regional power structure, but also the various responses that the initiative would, or could, elicit from powers in the region.

In sum, many questions still exist about the BRI's ongoing and future development. The lack of complete answers to these questions have no doubt worried policymakers and commentators. Yet, the evolving nature of the BRI debate has made salient the opportunity to shape and reshape the initiative in the future. Given the BRI's hitherto lack of concrete policy formulation in the intellectual property area, having this opportunity can indeed be a blessing in disguise. With the right focus, proper understanding, and appropriate guidance, this new initiative could be harnessed to improve the existing international and regional intellectual property systems.

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<sup>112</sup> See WANG, *supra* note 8, at 26–27 (discussing the BRI as a way to “realize global rebalancing”); see also Li Xing & Paulo Duarte, *Conclusion: The One Belt One Road in the Politics of Fear and Hope*, in MAPPING CHINA'S OBOR INITIATIVE, *supra* note 8, at 279, 286 (“Asian powers such as India and Japan, and also the United States, are staying away from the Chinese [One Belt, One Road] project, seeing it as a Chinese plan to ‘encircle the world’.” (quoting an article published in the *Financial Times*)).

<sup>113</sup> See MILLER, *supra* note 8, at 31 (“China wants to create a network of economic dependency that will consolidate its regional leadership, enable it to hedge against the United States’ alliance structure in Asia . . .”).

<sup>114</sup> See *id.* at 44–46 (discussing Japan’s investment and active engagement in Southeast Asia). See generally Jiang Yang, *The New Silk Road for China and Japan: Building on Shared Legacies*, in RETHINKING SILK ROAD, *supra* note 8, at 131 (discussing the BRI as it relates to the relationship between China and Japan).

<sup>115</sup> “Although India stands to gain from new connectivity projects in the region, Delhi views with considerable suspicion Chinese motivations and the long-term strategic ramifications of expanding Chinese economic influence in the region.” Mayer, *supra* note 18, at 15; see also Yang, *supra* note 69, at 18–19 (exploring whether the BRI is “squeezing India’s development space”). For discussions of India’s perspectives on the BRI, see generally Darshana M. Baruah & C. Raja Mohan, *Connectivity and Regional Integration: Prospects for Sino-Indian Cooperation*, in RETHINKING SILK ROAD, *supra* note 8, at 85; Nivedita Das Kundu, *Continental Aspect of the “One Belt One Road”: India’s Perspective*, in CHINA’S ONE BELT ONE ROAD, *supra* note 8, at 43; M.H. Rajesh, *Maritime Silk Road: An Indian Perspective*, in CHINA’S ONE BELT ONE ROAD, *supra* note 8, at 68; Song Haixiao, *The Belt and Road Initiative: India’s Strategy and Its Effect*, in CHINA’S BELT AND ROAD INITIATIVES, *supra* note 8, at 109.

### III. *New Intellectual Property Infrastructure*

Since the mid-1980s, China has been heavily criticized for its lack of protection and enforcement of intellectual property rights.<sup>116</sup> Although China's WTO accession and the repeated overhauls of its copyright, patent, and trademark systems have led to tremendous improvements,<sup>117</sup> China continues to struggle with a massive piracy and counterfeiting problem. In March 2018, the Office of the United States Trade Representative filed a WTO complaint against China for its failure to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>118</sup> (TRIPS Agreement).<sup>119</sup> That complaint built on the Section 301 investigation<sup>120</sup> that the Trump administration launched in August 2017 to review Chinese laws, policies, and practices in the areas of intellectual property, innovation, and technology development.<sup>121</sup> Because China and the

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<sup>116</sup> For the Author's earlier discussions of the piracy and counterfeiting problems in China, see generally Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131 (2000); Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901 (2006); Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173 (Daniel J. Gervais ed., 1st ed. 2007) [hereinafter Yu, *China Puzzle*].

<sup>117</sup> The Trademark Law was adopted in August 1982 and was amended in February 1993, October 2001, and August 2013. Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, amended Aug. 30, 2013, effective May 1, 2014) (China). The Patent Law was adopted in 1984 and was amended in September 1992, August 2000, and December 2008. Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Dec. 27, 2008, effective Oct. 1, 2009) (China). The Copyright Law was adopted in September 1990 and amended in October 2001 and February 2010. Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Oct. 27, 2001) (China).

<sup>118</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

<sup>119</sup> See Request for Consultations by the United States, *China—Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/1 (Mar. 23, 2018) [hereinafter Second TRIPS Complaint] (providing the complaint).

<sup>120</sup> Section 301 permits the President to investigate and impose sanctions on countries engaging in unfair trade practices that threaten the United States' economic interests. See 19 U.S.C. §§ 2411–2420 (2018).

<sup>121</sup> See Press Release, Office of the U.S. Trade Representative, USTR Announces Initiation of Section 301 Investigation of China (Aug. 18, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/ustr-announces-initiation-section> [<https://perma.cc/7JF7-JFX2>] (announcing the launch of the investigation); see also OFFICE

United States failed to resolve the complaint through consultation, the WTO established a panel in November 2018.<sup>122</sup>

Notwithstanding these troubling developments, the discourse on intellectual property protection in China has been slowly changing,<sup>123</sup> especially when one closely examines the statistics provided by international and regional organizations. Based on the latest WIPO statistics, in 2018 China stood behind only the United States in terms of the number of international applications<sup>124</sup> filed through the Patent Cooperation Treaty.<sup>125</sup> Among corporate applicants, Huawei Technologies, ZTE Corporation, and BOE Technology Group—all Chinese companies—ranked among the world's top ten based on international patent applications.<sup>126</sup> For the same year, China ranked third in the number of international

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OF THE U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018) (providing the final report of the investigation); OFFICE OF THE U.S. TRADE REPRESENTATIVE, UPDATE CONCERNING CHINA'S ACTS, POLICIES AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION (2018) (providing an update to the earlier report).

<sup>122</sup> See Request for the Establishment of a Panel by the United States, *China—Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/8 (Oct. 19, 2018) (requesting the establishment of a WTO panel).

<sup>123</sup> As I noted in an earlier article:

While piracy and counterfeiting problems continue to exist, and are unlikely to go away any time soon, many policymakers and commentators now see China as an innovative power, or at least an emerging one. They also explore whether the innovation in China complements or rivals the innovation in other parts of the world.

Peter K. Yu, *When the Chinese Intellectual Property System Hits 35*, 8 QUEEN MARY J. INTELL. PROP. 3, 6–7 (2018) [hereinafter Yu, *When the System Hits 35*]; see also Yu, *Half-Century of Scholarship*, *supra* note 1, at 1103–07 (discussing the growing body of scholarship that has emerged in the mid-2000s and the early 2010s to examine China's changing innovative capabilities).

<sup>124</sup> *Who Filed the Most PCT Patent Applications in 2018?*, WORLD INTELL. PROP. ORG., [https://www.wipo.int/export/sites/www/ipstats/en/docs/infographic\\_pct\\_2018.pdf](https://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_pct_2018.pdf) [<https://perma.cc/8KVN-5QTS>] (last visited Apr. 13, 2018).

<sup>125</sup> Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231.

<sup>126</sup> *Who Filed the Most PCT Patent Applications in 2018?*, *supra* note 124.

trademark applications<sup>127</sup> under the Madrid Agreement Concerning the International Registration of Marks and its related protocol.<sup>128</sup>

The WIPO figures are well corroborated by the statistics provided by national and regional patent offices. According to the United States Patent and Trademark Office, Chinese residents were behind only those of Japan, South Korea, and Germany in 2017 in terms of patent applications filed in the United States.<sup>129</sup> The European Patent Office also found that about 16 per cent of its patent filings in that same year originated in China, which trailed behind only the United States and Japan.<sup>130</sup> As if these metrics were not impressive enough, China now ranks 17th in the Global Innovation Index, marking the country's trajectory of progress in the innovation area.<sup>131</sup>

Given these two diametrically opposed sets of developments, it is timely and constructive to explore what cooperation the BRI could facilitate in the intellectual property area. Such exploration will be particularly important given the possibility for other countries along the Belt and Road to initiate such cooperation. As the Chinese government stated in *Vision and Actions*, the initiative "should be jointly built through consultation to meet the interests of all."<sup>132</sup> That document noted further the country's readiness to "conduct equal-footed consultation with all countries along the Belt and Road."<sup>133</sup>

To help identify the myriad possibilities for bilateral, regional, and international cooperation and to take advantage of the BRI's lack of concrete policy formulation in the intellectual property area, this Part examines six distinct areas: (1) substantive standards;

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<sup>127</sup> *Who Filed the Most Madrid Trademark Applications in 2018?*, WORLD INTELL. PROP. ORG., [https://www.wipo.int/export/sites/www/ipstats/en/docs/infographic\\_madrid\\_2018.pdf](https://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_madrid_2018.pdf) [<https://perma.cc/E65G-7WLE>] (last visited Apr. 13, 2018).

<sup>128</sup> Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, 828 U.N.T.S. 389 (revised at Stockholm July 14, 1967); Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, June 27, 1989, S. Treaty Doc. No. 106-41.

<sup>129</sup> U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT—FISCAL YEAR 2017, at 174–75 (2018) [hereinafter USPTO REPORT].

<sup>130</sup> *European Patent Filings per Country of Origin*, EUR. PAT. OFF., <https://www.epo.org/about-us/annual-reports-statistics/annual-report/2017/statistics/patent-filings.html#tab1> [<https://perma.cc/3NFL-TJH4>] (last visited Sept. 18, 2017).

<sup>131</sup> GLOBAL INNOVATION INDEX 2018: ENERGIZING THE WORLD WITH INNOVATION, at xx (Soumitra Dutta et al. eds., 2018).

<sup>132</sup> VISION AND ACTIONS, *supra* note 9, preface.

<sup>133</sup> *Id.* pt. VIII.

(2) procedural arrangements; (3) cross-border enforcement; (4) dispute resolution; (5) technical cooperation; and (6) market aggregation. Focusing on each area in turn, this Part highlights the different constructive possibilities that the BRI can realize in the intellectual property area. It is worth noting that these six areas are not meant to be exhaustive; rather, they are chosen to illustrate the BRI's many prospects and potential contributions.

#### A. Substantive Standards

As far as China and intellectual property are concerned, considerable attention has been devoted to questions concerning the country's engagement with international and regional norms.<sup>134</sup> Is China complying with these norms? Incorporating them into its laws? Trying to reshape existing norms? Or attempting to create new ones?

To address these questions, commentators have advanced the quadchotomy of norm breaker, norm taker, norm shaker, and norm maker to evaluate China's engagement with international norms.<sup>135</sup> In the first two decades after China's reopening to the outside world, this discussion of norm engagement has focused primarily on norm breaking and norm taking.<sup>136</sup> In recent years, however, the discussion has slowly expanded to cover norm shaking and norm making. As I noted in an earlier article:

Although piracy and counterfeiting remain major problems within the country, China is not the

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<sup>134</sup> See Ahl, *supra* note 103 (using the trichotomy of "obeying," "using," and "shaping" to analyze China's performance in public international law, and human rights in particular); Henry Gao, *China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker and, Maybe Rule Maker?*, in MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT: PERSPECTIVES AND PRIORITIES FROM DEVELOPING COUNTRIES 153 (Carolyn Deere Birkbeck ed., 2011) (using the trichotomy of "rule taker," "rule shaker," and "rule maker" to examine China's performance in the global trade arena); Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115, 119 ("China successfully moved from being a 'rule taker' to a 'rule shaker' to a 'rule maker.'"); Yu, *Rise of China*, *supra* note 11 (examining China's rise in the international intellectual property regime, with a focus on the country's engagement with international intellectual property norms); Yu, *Middle Kingdom*, *supra* note 13, at 223–58 (identifying three distinct phases in which China engages with international intellectual property norms following its WTO accession).

<sup>135</sup> See Yu, *Rise of China*, *supra* note 11, at 426–29 (advancing this quadchotomy).

<sup>136</sup> See Yu, *Middle Kingdom*, *supra* note 13, at 212–37 (discussing the "norm breaker" and "norm taker" phases).

traditional norm breaker one typically infers from its disappointing record of intellectual property protection. Instead, the country has been a norm taker for most of its participation in the international intellectual property regime. As its strength, experience, and self-confidence grow, it slowly assumes the additional roles of a norm shaker and a norm maker.<sup>137</sup>

While it remains difficult to clearly distinguish between norm shaking and norm making,<sup>138</sup> the increased development in both directions has suggested China's rapidly changing position. Given the many international norms involved in the BRI, the country's new position on norm engagement will no doubt color the development of this initiative.

Admittedly, there is an irresistible urge to explore whether the BRI would lead to more legal transplants<sup>139</sup>—a narrative that is familiar to those studying the historical evolution of the Chinese

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<sup>137</sup> *Id.* at 258–59.

<sup>138</sup> *See id.* at 250–51 (“[N]orm shaking and norm making represent two sides of the same coin. A norm that has been shaken up and transformed will necessarily result in the making of a new norm.”).

<sup>139</sup> The expectation of such transplants is understandable. As Lutz-Christian Wolff explained:

China is the B&R initiator and arguably the most economically and politically powerful of the B&R states. One therefore has to assume that China will, to a certain extent, dominate relationships with and between the B&R states. This could also mean that Chinese law and Chinese legal culture will be “exported” to other B&R states, e.g., as a result of joint legislative initiatives, because Chinese law functions as a role model for other B&R states, or simply because economic co-operations between parties from B&R states will be based on contractual arrangements that adopt Chinese law as the governing law.

Lutz-Christian Wolff, *The Flexibility of Chinese Law—Trick or Treat for the “Belt and Road” Initiative?*, in LEGAL DIMENSIONS, *supra* note 7, at 593, 594. For discussions of legal transplant, see generally ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993); Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China* [hereinafter Yu, *Transplant and Transformation*], in GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE 20 (Nari Lee et al. eds., 2016) [hereinafter CHINA AND EUROPE]; Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199 (1994); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Peter K. Yu, *Can the Canadian UGC Exception Be Transplanted Abroad?*, 26 INTELL. PROP. J. 175 (2014); Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693 (2010).

intellectual property system.<sup>140</sup> Nevertheless, there is no indication of such transplant efforts yet. A case in point is the negotiations for the RCEP intellectual property chapter. Despite being a dominant player, China has thus far kept a rather low profile in those negotiations.<sup>141</sup> As revealed by Knowledge Ecology International, China did not advance any draft text for the chapter. Instead, the four draft texts came from ASEAN, India, Japan, and South Korea.<sup>142</sup> The only area in which China has taken a more assertive position concerns the disclosure in patent applications of the origin or source of genetic resources used in inventions.<sup>143</sup> That disclosure requirement resembles, however, Article 26 of the Chinese Patent Law, which requires patent applicants to disclose the traditional knowledge and genetic resources used in their inventions.<sup>144</sup> The requirement is also consistent with the TRIPS Article 29*bis* proposal that China has cosponsored with other developing country members of the WTO.<sup>145</sup>

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<sup>140</sup> See generally WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 30–55 (1995) (discussing foreign transplants in the intellectual property area and how the Chinese “learned the law at gunpoint”); Niklas Bruun & Zhang Ligu, *Legal Transplant of Intellectual Property Rights in China: Norm Taker or Norm Maker?*, in *CHINA AND EUROPE*, *supra* note 139, at 43 (discussing the interaction between the transplant of intellectual property laws and the building of intellectual property norms as a dynamic process); Li Mingde, *Intellectual Property Law Revision in China: Transplantation and Transformation*, in *CHINA AND EUROPE*, *supra* note 139, at 65 (discussing the transplant of international intellectual property norms to China and the effort the country has made to assimilate those norms into its special political, economic, and social structures); Yu, *Transplant and Transformation*, *supra* note 139 (providing a history of the transplant of intellectual property laws in China and discussing the strengths, weaknesses, and future of such efforts).

<sup>141</sup> See Yu, *Middle Kingdom*, *supra* note 13, at 229–37 (exploring why China has assumed a low profile in the international intellectual property arena).

<sup>142</sup> See Yu, *RCEP and Trans-Pacific Norms*, *supra* note 2, at 683–84 (noting the various draft texts and providing sources for these texts).

<sup>143</sup> See *id.* at 716–17 (discussing China’s proposal).

<sup>144</sup> See Patent Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 12, 1984, amended Dec. 27, 2008, effective Oct. 1, 2009), art. 26 (China) (“With regard to an invention-creation accomplished by relying on genetic resources, the applicant shall, in the patent application documents, indicate the direct and original source of the genetic resources. If the applicant cannot indicate the original source, he shall state the reasons.”).

<sup>145</sup> See Communication from Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand, and Tanzania, *Doha Work Programme—The Outstanding Implementation Issue on the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity*, WTO Doc. WT/GC/W/564/Rev.2 (July 5, 2006) (proposing an amendment to create a new obligation to disclose in patent applications the origin of the biological resources and traditional knowledge used in inventions).



If the RCEP negotiations can provide any guidance on China's position in international and regional norm setting, the BRI will unlikely be the conduit for exporting Chinese intellectual property standards along the Belt and Road. Instead, any effort to transplant these standards and related practices will likely take a more indirect route—for example, by requiring foreign companies entering the Chinese market to embrace local standards and practices. This indirect route can be highly effective because many countries along the Belt and Road could ill afford to lose this lucrative market.<sup>146</sup>

### B. Procedural Arrangements

Compared with substantive standards, China is more likely to export its procedural arrangements. In the past decade, the State Intellectual Property Office of China (SIPO), now the National Intellectual Property Administration of China (CNIPA), has worked closely with other intellectual property offices to streamline and harmonize the patent examination systems.<sup>147</sup> Since 2007, SIPO has joined the European Patent Office, the Japan Patent Office, the Korean Intellectual Property Office, and the United States Patent and Trademark Office in the so-called “IP5” discussions.<sup>148</sup> These discussions have not only streamlined the patent examination process involving applications from the five participating countries, but have also consolidated SIPO's status as “a player in the top tier of patent offices that will dominate the emerging system of global patent administration.”<sup>149</sup>

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<sup>146</sup> See Yu, *RCEP and Trans-Pacific Norms*, *supra* note 2, at 727 (“For [many poor and weak developing countries], it is just not a viable option to lose the new trade and trade-related benefits provided by Australia, China, India, Japan, New Zealand, South Korea, and other more powerful neighbors through the RCEP.”); see also MILLER, *supra* note 8, at 18 (“The challenge for countries on China's periphery is how to extract as much economic benefit from China, in terms of trade and investment, without losing political and economic sovereignty.”).

<sup>147</sup> For discussions of SIPO and its related developments, see generally PETER DRAHOS, *THE GLOBAL GOVERNANCE OF KNOWLEDGE: PATENT OFFICES AND THEIR CLIENTS* 221–36 (2010); Cheng Wenting & Peter Drahos, *How China Built the World's Biggest Patent Office—The Pressure Driving Mechanism*, 49 INT'L REV. INTELL. PROP. & COMPETITION L. 5 (2018).

<sup>148</sup> Yu, *Middle Kingdom*, *supra* note 13, at 243; see also *About IP5 Co-operation*, <https://www.fiveipoffices.org/about.html> [<https://perma.cc/W68G-SAFM>] (last visited Oct. 28, 2018) (providing an overview of IP5 cooperation).

<sup>149</sup> DRAHOS, *supra* note 147, at 233.

For many countries along the Belt and Road, the recent developments in China have been highly impressive and have thereby enhanced the appeal of Chinese institutions, policies, and practices.<sup>150</sup> In 2017, SIPO received nearly 3.7 million patent applications, with over 3.5 million originating from domestic applicants.<sup>151</sup> The office also issued 420,144 invention patents<sup>152</sup>—a figure compared favorably with that of the United States.<sup>153</sup> By 2012, China has already surpassed the target of two million patent applications per year SIPO laid down in its *National Patent Development Strategy (2011–2020)*.<sup>154</sup>

In view of these numbers, it is not difficult to understand why intellectual property offices and industries along the Belt and Road

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<sup>150</sup> See STEFAN A. HALPER, THE BEIJING CONSENSUS: HOW CHINA'S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY 31 (2010) (noting "a growing number of developing nations that are loosely connected by an admiration for China"); MARK LEONARD, WHAT DOES CHINA THINK? 122 (2008) ("[G]overnment research teams from Iran to Egypt, Angola to Zambia, Kazakhstan to Russia, India to Vietnam and Brazil to Venezuela have been crawling around the Chinese cities and countryside in search of lessons from Beijing's experience."); Stephen Marks, *Introduction* to AFRICAN PERSPECTIVES ON CHINA IN AFRICA 1, 11 (Firoze Manji & Stephen Marks eds., 2007) (citing Nigerians' appreciation of the Chinese model for providing stability and visionary leadership).

<sup>151</sup> See *Table 1 Statistics on Applications for Inventions from Home and Abroad*, NAT'L INTELLECTUAL PROP. ADMIN. CHINA, <http://english.cnipa.gov.cn/statistics/2017s/201712/1111449.htm> [https://perma.cc/JCP7-RG28] (last visited May 9, 2018) (stating that in 2017 SIPO received a total of 1,381,594 applications for invention patents, out of which 1,245,709 belonged to domestic applicants); *Table 2 Statistics on Applications for Utility Model and Design from Home and Abroad*, NAT'L INTELLECTUAL PROP. ADMIN. CHINA, <http://english.cnipa.gov.cn/statistics/2017s/201712/1111448.htm> [https://perma.cc/J4RQ-F2XR] (last visited May 9, 2018) (stating that in 2017 SIPO received a total of 1,687,593 applications for utility model patents and 628,658 applications for design patents, out of which 1,679,807 and 610,817, respectively, originate from domestic applicants).

<sup>152</sup> See *Table 4 Distribution of Grants for Inventions Received from Home and Abroad*, NAT'L INTELLECTUAL PROP. ADMIN. CHINA, <http://english.cnipa.gov.cn/statistics/2017s/201712/1111446.htm> [https://perma.cc/DK5X-8RXA] (last visited May 9, 2018) (stating that in 2017 SIPO granted a total of 420,144 invention patents, out of which 326,970 belonged to domestic applicants).

<sup>153</sup> See USPTO REPORT, *supra* note 129, at 168 (stating that the U.S. Patent and Trademark Office issued 347,243 patents in 2017).

<sup>154</sup> STATE INTELLECTUAL PROP. OFFICE, NATIONAL PATENT DEVELOPMENT STRATEGY (2011–2020) pt. III (2011) (China), *translated at* <http://graphics8.nytimes.com/packages/pdf/business/SIPONatPatentDevStrategy.pdf> [https://perma.cc/HDQ3-W2XJ] [hereinafter NATIONAL PATENT DEVELOPMENT STRATEGY]; see also Steve Lohr, *When Innovation, Too, Is Made in China*, N.Y. TIMES (Jan. 1, 2011), <http://www.nytimes.com/2011/01/02/business/02unboxed.html> [https://perma.cc/XA6K-2P9H] (stating that David Kappos, the director of the U.S. Patent and Trademark Office, described SIPO's 2015 targets as "mind-blowing numbers").

have been eager to work closely with their counterparts in China. Considering the critical importance of the Chinese market to rights holders in countries along the Belt and Road, a streamlined process for applying for patents, trademarks, designs, and other forms of intellectual property rights can be highly beneficial.<sup>155</sup> Indeed, there is a strong possibility that China will consider extending streamlined arrangements similar to those under the IP5 to intellectual property offices along the Belt and Road. As Lee Jyh-an observed, “[b]y expanding [the IP5] experiences to collaboration with IP authorities in [Belt and Road] countries, China will not only share its expertise in IP administration, such as patent examination, but also help domestic industries to seek better IP protection in those foreign countries.”<sup>156</sup> In addition, greater collaboration between the CNIPA and intellectual property offices along the Belt and Road will further strengthen the global profile of Chinese intellectual property offices.

One interesting question relating to both substantive standards and procedural arrangements concerns whether China will eventually establish a regional system that offers unitary protection, similar to what the European Union currently offers in the form of a European Union trade mark<sup>157</sup> or a European Union design.<sup>158</sup> This question not only reflects the constant urge of intellectual property rights holders to have a more efficient intellectual property system, but also

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<sup>155</sup> As a report on *China Daily* recently observed:

Since September 2017, China’s granted patent is regarded as effective in Cambodia. In addition, starting from April in 2018, Laos has acknowledged the results of the patent examination in China. This progress has enabled Chinese applicants to obtain patents and IP protection in those countries more efficiently. Cumbersome and repetitious review procedures no longer exist.

Li, *Intellectual Property in Focus*, *supra* note 61.

<sup>156</sup> Lee, *supra* note 7, at 423; *see also* NATIONAL PATENT DEVELOPMENT STRATEGY, *supra* note 154, pt. IV, § 5 (“Participate in international cooperation in examination business in a pragmatic manner and promote examination capacity building. Strengthen capacity building for patent examination.”).

<sup>157</sup> *See* Regulation 2017/1001, of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark art. 1(2), 2017 O.J. (L 154) 1 (“An EU trade mark shall have a unitary character. It shall have equal effect throughout the Union . . .”).

<sup>158</sup> *See* Council Regulation 2002/6, of 12 December 2001 on Community Designs art. 1(3), *as amended by* Council Regulation 2006/1891, 2006 O.J. (L 386) 14 (“A Community design shall have a unitary character. It shall have equal effect throughout the Community.”).

the persistent, albeit unfulfilled, hope for finally establishing a world patent or trademark system.<sup>159</sup>

Despite these aspirations, the Asia-Pacific region has not seen much success in creating arrangements comparable to what the European Union now offers. Although ASEAN members have worked closely with each other in the intellectual property area,<sup>160</sup> it has not yet offered any unified intellectual property rights in the ten-member association.<sup>161</sup> Thus, if any arrangements are to be offered through the BRI, such arrangements are likely to be closer to the European Patent Convention<sup>162</sup> than the European Union Trade Mark system.<sup>163</sup>

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<sup>159</sup> But see John H. Barton, *Issues Posed by a World Patent System*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 617, 617 (Keith E. Maskus & Jerome H. Reichman eds., 2005) (“There is a strong drive toward a world patent system, but such a system may pose special problems for the developing world.”); Friedrich-Karl Beier, *One Hundred Years of International Cooperation—The Role of the Paris Convention in the Past, Present and Future*, 15 INT’L REV. INDUS. PROP. & COPYRIGHT L. 1, 8 (1984) (“In view of the large variety of national laws and interests, . . . [the] idealistic concept of an international uniform law [under the Paris Convention] proved too utopian. And in fact, the idea of a ‘world patent’ or ‘world trademark,’ which was subsequently revived still remains a castle in the sky.”); Sam Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9, 19 (1986) (discussing the political difficulty in creating uniform protection in the Berne Convention).

<sup>160</sup> See Memorandum of Understanding Between the Governments of the Member States of the Association of Southeast Asian Nations and the Government of the People’s Republic of China on Cooperation in the Field of Intellectual Property, ASEAN-China, Dec. 21, 2009, <https://www.asean.org/storage/images/archive/15thsummit/MoU-China-IP-Eng.pdf> [<https://perma.cc/W6DD-BFJ4>] (providing a memorandum of understanding to foster cooperation in the intellectual property area).

<sup>161</sup> See ALEXANDER DEGELSEGGER ET AL., ASEAN ECONOMIC COMMUNITY AND INTELLECTUAL PROPERTY RIGHTS: AN ASSESSMENT OF FRAMEWORK CONDITIONS FOR INNOVATION 13 (2016) (“The IP institutions, such as national IP offices, are likely to invest more in regional cooperation to ease IP development and protection, with a unified IP (e.g. patent) for the region in question as the ultimate possible objective, but with more harmonisation and easier procedures as the likely second best.”); see also Yu, *ASEAN–China Strategic Partnership*, *supra* note 21 (discussing the cooperative efforts between ASEAN and China in the intellectual property area).

<sup>162</sup> Convention on the Grant of European Patents, Oct. 5, 1973, as amended by Decision of the Administration Council of the European Patent Organization of Dec. 21, 1978, 13 I.L.M. 268 (1974).

<sup>163</sup> See Röhr, *supra* note 110, at 234 (“No one in Berlin’s foreign policy establishment believes . . . that the Silk Road initiative could eventually become something even remotely akin to the [European Union].”).

### C. Cross-Border Enforcement

Cross-border enforcement is of great significance to Asia and the developing world.<sup>164</sup> Such enforcement, by extension, will have a considerable impact on the BRI. Given China's continued struggle with a massive piracy and counterfeiting problem—and the fact that this problem is unlikely to go away in the near future<sup>165</sup>—it is doubtful that China will take any aggressive position on intellectual property enforcement in its dealing with countries along the Belt and Road, similar to what developed countries did during the ACTA negotiations.<sup>166</sup> Indeed, the lack of strong intellectual property enforcement standards in the RCEP intellectual property chapter provides a highly revealing contrast.<sup>167</sup>

Nevertheless, with the rapidly expanding volumes of intellectual property Chinese firms and nationals now own, the country has slowly moved into a position where it can benefit from stronger enforcement of intellectual property rights, even if such benefits still do not compare favorably with those enjoyed by the European Union or the United States.<sup>168</sup> China will therefore have a

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<sup>164</sup> See Peter K. Yu, *Intellectual Property and Asian Values*, 16 MARQ. INTELL. PROP. L. REV. 329, 379 (2012) (“Enforcement will remain a key issue for many Asian countries in at least the next decade.”).

<sup>165</sup> See Yu, *When the System Hits 35*, *supra* note 123, at 6 (noting that “piracy and counterfeiting problems . . . are unlikely to go away any time soon”).

<sup>166</sup> For the Author's discussions of intellectual property enforcement, see generally Peter K. Yu, *Digital Copyright Enforcement Measures and Their Human Rights Threats*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 455 (Christophe Geiger ed., 2015); Peter K. Yu, *Enforcement: A Neglected Child in the Intellectual Property Family*, in THE INTERNET AND THE EMERGING IMPORTANCE OF NEW FORMS OF INTELLECTUAL PROPERTY 279 (Susy Frankel & Daniel Gervais eds., 2016); Peter K. Yu, *Intellectual Property Enforcement and Global Climate Change*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND CLIMATE CHANGE 107 (Joshua D. Sarnoff ed., 2016); Peter K. Yu, *Why Are the TRIPS Enforcement Provisions Ineffective?*, in RESEARCH HANDBOOK ON CROSS-BORDER ENFORCEMENT OF INTELLECTUAL PROPERTY 770 (Paul Torremans ed., 2014); Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1 (2010); Yu, *What Enforcement?*, *supra* note 97.

<sup>167</sup> See Yu, *RCEP and Trans-Pacific Norms*, *supra* note 2, at 714–16 (discussing the enforcement provisions in the draft RCEP intellectual property chapter).

<sup>168</sup> See *Charges for the Use of Intellectual Property, Payments (BoP, Current US\$)*, WORLD BANK, <https://data.worldbank.org/indicator/BM.GSR.ROYL.CD> [<https://perma.cc/VQQ7-MDAT>] (last visited Oct. 15, 2016) (stating that the charges are \$28.66 billion and \$48.35 billion for China and the United States, respectively, and that the charges for France, Germany, and the United Kingdom combined are already \$40.15 billion).

strong interest in helping other countries along the Belt and Road to strengthen intellectual property enforcement.

Given China's continued reluctance to demand stronger intellectual property enforcement standards at the international and regional levels, the country will likely focus on improving intellectual property enforcement through international and regional cooperation and greater information sharing between intellectual property enforcement authorities. As the Chinese government stated in *Vision and Actions*, "[c]ountries along the Belt and Road should enhance customs cooperation such as information exchange, mutual recognition of regulations, and mutual assistance in law enforcement."<sup>169</sup> To some extent, the approach outlined in this guiding document is similar to the one stated in Section 10 of the draft RCEP intellectual property chapter, which is devoted to cooperation and consultation.<sup>170</sup> ACTA also contains some strong language regarding the use of shared information to improve enforcement,<sup>171</sup> even though China may understandably remain reluctant to embrace such language.

As far as cross-border enforcement is concerned, greater cooperation and information sharing can be highly effective.<sup>172</sup> After all, piracy and counterfeiting activities can be stopped at the border of either the in-bound or out-bound country. Notwithstanding these dual possibilities, the comprehensive enforcement provisions in the TRIPS Agreement do not focus on exports.<sup>173</sup> As the WTO panel

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<sup>169</sup> VISION AND ACTIONS, *supra* note 9, pt. IV; *see also* STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, OUTLINE OF THE NATIONAL INTELLECTUAL PROPERTY STRATEGY ¶ 48 (2008), [http://www.gov.cn/english/2008-06/21/content\\_1023471.htm](http://www.gov.cn/english/2008-06/21/content_1023471.htm) [<https://perma.cc/ALN6-UZ2P>] [hereinafter NATIONAL INTELLECTUAL PROPERTY STRATEGY] ("International cooperation in customs law enforcement needs to be fully utilized in order to effectively crack down on cross-border illegal acts and crimes involving intellectual property.").

<sup>170</sup> Regional Comprehensive Economic Partnership Intellectual Property Chapter § 10 (Oct. 15 draft), <http://keionline.org/sites/default/files/RCEP-IP-Chapter-15October2015.docx> [<https://perma.cc/TKQ3-MDVL>].

<sup>171</sup> *See* ACTA, *supra* note 97, art. 34(a) (stipulating that "each Party shall endeavour to exchange with other Parties . . . information the Party collects under the provisions of Chapter III (Enforcement Practices), including statistical data and information on best practices").

<sup>172</sup> *See* Lee, *supra* note 7, at 423 ("[T]he Chinese customs authority must cooperate with its counterparts along the [BRI] and enforce border measures.").

<sup>173</sup> *See* TRIPS Agreement, *supra* note 118, arts. 41–61 (stipulating provisions covering the enforcement of intellectual property rights); *see also* Peter K. Yu, *TRIPS and Its Achilles'*

made clear in *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, Article 59 of the TRIPS Agreement, which covers remedies in the intellectual property enforcement section, “is not applicable to the Customs measures insofar as those measures apply to goods destined for exportation.”<sup>174</sup> It is therefore no surprise that ACTA sought to change the TRIPS position by extending the enforcement provisions to both imports and exports. Covering border measures, Article 16 of that agreement states expressly that “[e]ach Party shall adopt or maintain procedures with respect to import and export shipments.”<sup>175</sup>

#### D. Dispute Resolution

Although legal commentators rarely consider Asian countries litigious,<sup>176</sup> and industries and governments have frequently criticized the region for offering inadequate protection of intellectual property rights,<sup>177</sup> China has now emerged as the world’s most litigious country in the intellectual property area.<sup>178</sup> As the Supreme

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*Heel*, 18 J. INTELL. PROP. L. 479, 481–82 (2011) (“With twenty-one provisions on obligations that range from border measures to criminal sanctions, the TRIPS Agreement, for the first time, provides comprehensive international minimum standards on the enforcement of intellectual property rights.”).

<sup>174</sup> Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 7.231, WTO Doc. WT/DS362/R (adopted Jan. 26, 2009).

<sup>175</sup> ACTA, *supra* note 97, art. 16.1.

<sup>176</sup> See, e.g., William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT’L L.J. 51, 67 (1987) (“[T]he United States is a more litigious society than Japan, which places a high premium on consensus.”).

<sup>177</sup> See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2018 SPECIAL 301 REPORT 9 (2018) (placing China, India, and Indonesia on the Priority Watch List and Pakistan, Thailand, and Vietnam on the Watch List); Letter from Kevin M. Rosenbaum, Int’l Intellectual Prop. Alliance, to Daniel Lee, Acting Assistant U.S. Trade Representative for Innovation and Intellectual Prop., Office of the U.S. Trade Representative (Feb. 7, 2019) (recommending that China, India, Taiwan, and Vietnam be placed on the Priority Watch List and Indonesia and Thailand be placed on the Watch List).

<sup>178</sup> See Peter K. Yu, *Foreword to PATENTS AND INNOVATION IN MAINLAND CHINA AND HONG KONG: TWO SYSTEMS IN ONE COUNTRY COMPARED* xiv, xvi (Li Yahong ed., 2017) (“With over 12,000 patent lawsuits in 2016, as reported by the Supreme People’s Court, China is now one of the world’s preferred venues for patent litigation.”); J. Benjamin Bai & Da Guoping, *Strategies for Trade Secrets Protection in China*, 9 NW. J. TECH. & INTELL. PROP. 351, 351 (2011) (“China became the world’s most litigious country for intellectual property disputes in 2005, surpassing the U.S. in the number of intellectual property lawsuits filed annually.”); Xuan-Thao Nguyen, *The China We Hardly Know: Revealing the New China’s Intellectual Property Regime*, 55 ST. LOUIS L.J. 773, 775 (2011) (comparing the patent, copyright, and trademark cases filed in the United States in 2005 and 2006 with those filed in China); Peter K. Yu, *The Rise and Decline of the Intellectual Property Powers*, 34

People's Court of China stated in its 2018 report, over 16,000 new patent cases were filed in 2017, featuring an increase of close to 30 percent.<sup>179</sup> That same report also showed the filing of close to 38,000 new trademark cases and over 137,000 new copyright cases, with increases of close to 40 and 60 percent, respectively.<sup>180</sup>

In view of China's growing litigiousness in the intellectual property area, it is not difficult to understand why the resolution of private disputes has recently received considerable attention among Chinese policymakers and commentators.<sup>181</sup> Indeed, legal risks have been highlighted as one of the BRI's potential challenges. As Wang Yiwei observed:

[T]he Belt and Road Initiative involves more than 60 countries with the legal systems being different [from] that of China. This will give rise to the risk of asymmetric legal information. According to legal systems, countries involved in the initiative mainly

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CAMPBELL L. REV. 525, 544–49 (2012) (discussing the potential intellectual property litigation explosion in China).

<sup>179</sup> SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, THE STATUS OF JUDICIAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN CHINESE COURTS (2017) 3 (2018), <https://chinaipr2.files.wordpress.com/2018/06/2017e799bde79aaee4b9a6-2018041.docx> [<https://perma.cc/X8LN-E5UM>] (reporting the number of new patent cases at 16,010).

<sup>180</sup> *Id.* (reporting the number of new trademark and copyright cases at 37,946 and 137,267, respectively).

<sup>181</sup> Countries have generally attempted to resolve public disputes under two different routes. The first is the state-to-state dispute settlement mechanism, such as the one under the WTO. See Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (providing the rules for the WTO dispute settlement process). The second route is the investor-state dispute settlement mechanism, such as the one provided in the investment chapter in bilateral, regional, or plurilateral trade agreements. See Bath, *supra* note 85, at 182–87 (discussing investor-state dispute settlement in the BRI context). For the Author's discussions of investor-state dispute settlement, see generally Peter K. Yu, *Conceptual and Institutional Improvements in Investor-State Dispute Settlement*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND INVESTMENT LAW (Christophe Geiger ed., forthcoming 2019); Peter K. Yu, *Investor-State Dispute Settlement and the Trans-Pacific Partnership*, in INTELLECTUAL PROPERTY AND THE JUDICIARY 463 (Christophe Geiger et al. eds., 2018); Peter K. Yu, *The Pathways of Multinational Intellectual Property Dispute Settlement*, in INTELLECTUAL PROPERTY AS PROPERTY: OF PHARMACEUTICALS, TOBACCO, COMMODITIES AND OTHER MATTERS (Christopher Heath & Anselm Kamperman Sanders eds., forthcoming 2019); Peter K. Yu, *Crossfertilizing ISDS with TRIPS*, 49 LOY. U. CHI. L.J. 321 (2017); Peter K. Yu, *The Investment-Related Aspects of Intellectual Property Rights*, 66 AM. U. L. REV. 829 (2017).



fall into two categories: countries adopting the continental legal system and those following the Anglo-American legal system. Apart from that, some belong to the Islamic legal system. . . . [By contrast,] China has adopted a unique socialist legal system. Despite its closeness to the continental legal system, when it comes to specific legal regulations, China's system is still different from those of other countries.<sup>182</sup>

More importantly, "[t]he difference in legal systems can result in different outcomes when legal disputes occur, in which case the applicability of laws is weakened, and a series of legal risks can emerge."<sup>183</sup> Some countries along the Belt and Road may also lack sophisticated legislation or effective enforcement mechanisms,<sup>184</sup> not to mention that the legal systems in these countries can be severely underdeveloped.<sup>185</sup>

Fortunately, the BRI will benefit from discussions that have already started in the BRICS context. In October 2015, the Shanghai International Economic and Trade Arbitration Commission launched a pioneering center to resolve private disputes involving the BRICS countries.<sup>186</sup> "Created with the support of the China Law Society and other members of the BRICS legal community," the BRICS Dispute Resolution Centre Shanghai aims to "provide[] alternative dispute resolution services for commercial disputes between parties from the BRICS countries."<sup>187</sup> Two months before the Eighth BRICS Summit in Goa, India in October 2016, members of the BRICS community also

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<sup>182</sup> WANG, *supra* note 8, at 113.

<sup>183</sup> *Id.*

<sup>184</sup> As Professor Wang continued, "[T]he legislation of some countries is not sophisticated enough with frequent amendments. In terms of law enforcement, these countries discriminate against foreign or foreign-funded enterprises, sometimes even issuing targeted legal regulations . . . on certain transnational companies to benefit their domestic, political and economic situations." *Id.* at 113–14.

<sup>185</sup> *See id.* at 119 ("The Belt and Road Initiative involves a great many countries, some of which have the problem of inefficient legal structures. In their overseas business, there is a great possibility that Chinese enterprises will find no laws to follow.").

<sup>186</sup> Fernando Dias Simões, *A Dispute Resolution Centre for the BRICS?*, in BRICS-LAWYERS' GUIDE, *supra* note 1, at 287, 296.

<sup>187</sup> *Id.*

identified . . . the need to set up a neutral institution for the resolution of intra-BRICS commercial and investment disputes; to develop the expertise and skills of legal professionals in international arbitration among BRICS nations to support and ensure the success of the BRICS international arbitral mechanism; to ensure adequate representation of arbitrators from emerging economies to avoid structural bias and partiality or the perception thereof by arbitrators originating from the developed world; and to reform the existing investor state arbitration mechanism under the International Centre for the Settlement of Investment Disputes . . . and under bilateral investment treaties to account for the unique circumstances and challenges of emerging economies.<sup>188</sup>

Outside the BRICS context, some “commentators have urged the Chinese government to build a joint IP dispute resolution mechanism.”<sup>189</sup> A similar mechanism can be established in the BRI context.

### E. Technical Cooperation

Technical cooperation is seemingly benign, yet it has serious ramifications for the development of the intellectual property system.<sup>190</sup> Indeed, commentators have repeatedly questioned

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<sup>188</sup> *Id.*

<sup>189</sup> Lee, *supra* note 7, at 423. See generally Chai Yuhong, *Regional Dispute Resolution: An International Civil Dispute Resolution Model for East Asia*, in INTERNATIONAL GOVERNANCE, *supra* note 8, at 261 (calling for the development of an international civil dispute resolution model for East Asia).

<sup>190</sup> Technical cooperation is included as an obligation under Article 67 of the TRIPS Agreement, which provides as follows:

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

whether governments in developed countries and international and regional organizations have provided technical assistance in the right direction.<sup>191</sup> Given the controversy in this area, one would logically question whether the assistance China provides through the BRI will ultimately benefit developing countries along the Belt and Road. This question is particularly timely considering that rapidly expanding volumes of intellectual property Chinese firms and nationals now own and the growing ability of the Chinese intellectual property offices and industry groups to provide technical assistance.<sup>192</sup>

Notwithstanding this understandable concern, a country's position on technical cooperation tends to be colored by its intention to export intellectual property standards.<sup>193</sup> Considering that China

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TRIPS Agreement, *supra* note 118, art. 67.

<sup>191</sup> See CAROLYN DEERE, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES 180–86 (2009) (discussing the use of technical assistance and capacity-building programs to advance agendas in TRIPS-related policy debates); Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 25 (2004) (“[T]he countries in a position to provide assistance do so on their own terms; that is, they help implement highly protectionist regimes, without regard for the actual needs of developing nations.”); Peter K. Yu, *The Strategic and Discursive Contributions of the Max Planck Principles for Intellectual Property Provisions in Bilateral and Regional Agreements*, 62 DRAKE L. REV. DISCOURSE 20, 30 (2014) (“[T]echnical assistance should not be provided based on the interests of donor countries or the privileged members of an international intergovernmental organization—be it WIPO or the WTO.”); Yu, *Thinking About the TPP*, *supra* note 32, at 109 (“Oftentimes, . . . ‘best practices’ are introduced [by technical assistance experts] without regard to a particular country’s local needs, interests, conditions, or priorities.”); see also Christopher May, *Capacity Building and the (Re)production of Intellectual Property Rights*, 25 THIRD WORLD Q. 821, 822 (2004) (“[C]apacity building for [intellectual property rights] . . . may . . . lead to effective ‘epistemic lock-in’: capacity building programmes socialise policy makers, practitioners and others into a specific way of dealing with, and regulating, [intellectual property rights]. It encourages the development of a TRIPS mind-set.”).

<sup>192</sup> See NATIONAL PATENT DEVELOPMENT STRATEGY, *supra* note 154, pt. IV, ¶ 12 (“Increase assistance to developing countries in the capacity building on intellectual property and strengthen coordination with developing countries on China’s positions and promote common development in patent area.”).

<sup>193</sup> See DEERE, *supra* note 191, at 180–86 (discussing the use of technical assistance and capacity-building programs to advance agendas in TRIPS-related policy debates); Duncan Matthews & Viviana Muñoz-Tellez, *Bilateral Technical Assistance and TRIPS: The United States, Japan and the European Communities in Comparative Perspective*, 9 J. WORLD INTELL. PROP. 629, 632 (2006) (discussing the technical assistance provided by the United States, Japan, and the European Union in accordance with Article 67 of the TRIPS Agreement).

has thus far remained reluctant to export these standards,<sup>194</sup> one has to wonder how eager China is to use technical cooperation to covertly achieve what it has so far declined to do. It is worth recalling that the BRI has been created in part to build trust in countries along the Belt and Road and to promote harmony between them.<sup>195</sup> The meager benefits of exporting intellectual property standards technical cooperation would unlikely compensate for the harm resulting from the distrust such covert action would breed in countries along the Belt and Road.

If the BRI is to facilitate technical cooperation, such cooperation will likely resemble those aid and cooperation efforts China is now undertaking in Africa, South America, and Southeast Asia.<sup>196</sup> Although these efforts have inevitably raised neocolonial concerns,<sup>197</sup> they also include generous “early harvest programs” that

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<sup>194</sup> See discussion *supra* Section III.A.

<sup>195</sup> See VISION AND ACTIONS, *supra* note 9, pt. II (emphasizing that the BRI is “harmonious and inclusive”); *id.* (“The Initiative seeks mutual benefit. It accommodates the interests and concerns of all parties involved, and seeks a conjunction of interests and the ‘biggest common denominator’ for cooperation so as to give full play to the wisdom and creativity, strengths and potentials of all parties.”); *id.* pt. III (“The Belt and Road Initiative is a way for win-win cooperation that promotes common development and prosperity and a road towards peace and friendship by enhancing mutual understanding and trust . . .”); see also Zhang Jie, *Security Environment Around China: Changes, Construction, and Challenges*, in CHINA’S BELT AND ROAD INITIATIVES, *supra* note 8, at 13, 33 (“China is supposed to strengthen mutual trust in politics and security to create a favorable environment for regional economic collaboration, while insisting on maintaining the bottom line of the integrity of national sovereignty.”).

<sup>196</sup> See Wang Yiwei, *The Belt and Road—Hot Inside and Cold Outside? A Position Essay*, in LEGAL DIMENSIONS, *supra* note 7, at 95, 98–99 (discussing why the BRI cannot be equated with foreign aid). See generally Deborah Brautigam, *China’s Foreign Aid in Africa: What Do We Know*, in CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 197 (Robert I. Rotberg ed., 2008) (discussing China’s foreign aid in Africa); DEBORAH BRAUTIGAM, *THE DRAGON’S GIFT: THE REAL STORY OF CHINA IN AFRICA* (2010) (providing a comprehensive account of China’s aid and economic cooperation in Africa). For discussions of China’s engagement with Africa, see generally AFRICAN PERSPECTIVES ON CHINA IN AFRICA (Firoze Manji & Stephen Marks eds., 2007); CHINA AND THE DEVELOPING WORLD, *supra* note 14; CHINA INTO AFRICA, *supra*; CHINA RETURNS TO AFRICA: A RISING POWER AND A CONTINENT EMBRACE (Chris Alden et al. eds., 2008); CHINA’S NEW ROLE IN AFRICA AND THE SOUTH: A SEARCH FOR A NEW PERSPECTIVE (Dorothy-Grace Guerrero & Firoze Manji eds., 2008) [hereinafter CHINA’S NEW ROLE]; THE RISE OF CHINA AND INDIA IN AFRICA: CHALLENGES, OPPORTUNITIES AND CRITICAL INTERVENTIONS (Fantu Cheru & Cyril Obi eds. 2010) [hereinafter RISE OF CHINA AND INDIA IN AFRICA]; IAN TAYLOR, *CHINA’S NEW ROLE IN AFRICA* (2009).

<sup>197</sup> As two commentators observed:

There is a growing concern in Africa that the increasing engagement of the Asian giants, in their search for energy and minerals, could, if not

enable qualified trading partners to obtain early access to select sectors of the Chinese market.<sup>198</sup> To a large extent, these early harvest programs fit well with what Joshua Kurlantzick has described as China's "charm offensive," one of BRI's potential goals.<sup>199</sup>

One question that will likely arise in this area concerns technology transfer. The TRIPS Agreement has built such transfer into Article 66, which requires developed countries to provide incentives for their businesses and institutions to promote and encourage technology transfer to least developed countries.<sup>200</sup> Although China is still a developing country and does not bear any technology transfer obligation under Article 66, China's "emerging power" status has likely generated expectation that the country will at least transfer some technology to its poor neighbors along the Belt and Road.

In *Vision and Actions*, the Chinese government affirmed its "commit[ment] to shouldering more responsibilities and obligations within its capabilities, and making greater contributions to the peace and development of mankind."<sup>201</sup> Emphasizing the goal of building "people-to-people bonds," that document also stated that China and countries along the Belt and Road "should increase . . . cooperation

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managed properly, turn out to be just as bad as the "scramble for resources" that led to the colonization of the continent during the second half of the nineteenth century.

Fantu Cheru & Cyril Obi, *Introduction—Africa in the Twenty-First Century: Strategic and Development Challenges*, in *RISE OF CHINA AND INDIA IN AFRICA*, *supra* note 196, at 1, 6; *see also* R. EVAN ELLIS, *CHINA IN LATIN AMERICA: THE WHATS AND WHEREFORES* 1 (2009) (noting "concern about the long-term geopolitical ambitions of [China] and worry about exchanging one form of dependency for another"); Dot Keet, *The Role and Impact of Chinese Economic Operations in Africa*, in *CHINA'S NEW ROLE*, *supra* note 196, 78, 81 (questioning "whether the rapidly growing role of China . . . is one of partnership and cooperation, or more akin to colonial or neocolonial patterns, or reflective of a new imperialism"); MILLER, *supra* note 8, at 80 ("As China bankrolls development across Central Asia, ordinary people fear being swallowed by their neighbor."); TAYLOR, *supra* note 196, at 2 ("Our African partners really have to watch out that they will not be facing a new process of colonization [in their relations with China].") (quoting Karin Kortmann, Parliamentary State Secretary, German Development Ministry)).

<sup>198</sup> *See* Yu, *Sinic Trade Agreements*, *supra* note 5, at 996–97 (discussing these programs).

<sup>199</sup> *See supra* note 92 and accompanying text.

<sup>200</sup> *See* TRIPS Agreement, *supra* note 118, art. 66(2) ("Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.").

<sup>201</sup> *VISION AND ACTIONS*, *supra* note 9, pt. I.

in science and technology, establish joint labs (or research centers), international technology transfer centers and maritime cooperation centers, promote sci-tech personnel exchanges, cooperate in tackling key sci-tech problems, and work together to improve sci-tech innovation capability.”<sup>202</sup> At the High Level Conference on Intellectual Property for Countries Along the “Belt and Road” in July 2016, State Councilor Wang Yong also noted that the BRI could provide assistance in the area of “joint human resources training.”<sup>203</sup>

The expectation that China will share a greater burden on technology transfer is not difficult to understand when one considers the BRI’s considerable potential to enhance China’s position in science and technology. As Wang Yiwei observed, “[T]he Belt and Road is a high-tech road, in which China’s capital and technology will be used to promote the high quality ‘Made in China’ brand in the big markets of Europe and Asia.”<sup>204</sup> The initiative will also greatly improve China’s global competitiveness. As Professor Wang continued:

China’s competitiveness will be improved in an all-round manner. Based on the initiative, China will identify new comparative advantages through all-dimensional opening-up in the system of global labor division. In the new round of global competition, China climbs up the global industrial chain from its low-end to high-end, and China’s comparative advantages also upgrade from being labor-and-resource-intensive to technology-and-capital-intensive.<sup>205</sup>

Ironically, the issue about technology transfer appeared in the United States’ recent WTO complaint against China.<sup>206</sup> Focusing on

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<sup>202</sup> *Id.* pt. IV; see also Rasmus Gjedssø Bertelsen & Su Ping, *Knowledge-Based Institutions in Sino-Arctic Engagement: Lessons for the Belt and Road Initiative*, in *RETHINKING SILK ROAD*, *supra* note 8, at 147 (discussing active Sino-Arctic cooperation through knowledge-based institutions).

<sup>203</sup> Belt and Road Conference Release, *supra* note 57; see also NATIONAL INTELLECTUAL PROPERTY STRATEGY, *supra* note 169, ¶ 65 (“Encourage international cooperation on training of intellectual property professionals.”).

<sup>204</sup> WANG, *supra* note 8, at 12.

<sup>205</sup> *Id.* at 18.

<sup>206</sup> Second TRIPS Complaint, *supra* note 119.

the topic of “forced technology transfer,” the complaint alleged that “China deprive[d] foreign intellectual property rights holders of the ability to protect their intellectual property rights in China as well as freely negotiate market-based terms in licensing and other technology-related contracts.”<sup>207</sup> Whether China wins or loses in this dispute, the WTO panel decision will likely have some impact on the future interpretation of the technology transfer obligations under Articles 7 and 66.2 of the TRIPS Agreement.<sup>208</sup> By extension, the case will therefore have some consequences—both intended and unintended—on the future of technology transfer along the Belt and Road.

#### F. Market Aggregation

The final area of potential cooperation through the BRI concerns market aggregation, which is particularly important for small countries along the Belt and Road. For these countries, the opportunity to connect with other countries, especially larger ones, will greatly enhance their ability to participate in international and regional trade, attract foreign direct investment, or develop regulatory solutions to cross-border problems. As I noted in relation to the recent amendment to the TRIPS Agreement:

[The regional pooling arrangement provided by Article 31*bis*(3) of the TRIPS Agreement] allows less developed countries to aggregate their markets to generate the purchasing power needed to make the development of an indigenous pharmaceutical industry attractive. It also paves the way for the development of regional supply centers, procurement

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<sup>207</sup> *Id.* at 1.

<sup>208</sup> See TRIPS Agreement, *supra* note 118, art. 7 (“The protection and enforcement of intellectual property rights should contribute to . . . the transfer and dissemination of technology . . . .”); *id.* art. 66.2 (“Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.”).

systems, patent pools and institutions, while facilitating technical cooperation within the region.<sup>209</sup>

Indeed, policy choices tend to vary according to market size. A country that has a sufficiently large market is often in a better position to utilize intellectual property protection to attract foreign direct investment.<sup>210</sup> Such a country will also be able to use threats of compulsory licensing more effectively to induce foreign manufacturers to lower the price of drugs and other intellectual property-based goods and services.<sup>211</sup> Given these multiple benefits, it is understandable why the drafters of the recently adopted Article 31*bis* included language to support market aggregation and pooled procurement.<sup>212</sup> This provision allows “a pharmaceutical product produced or imported under a compulsory licence . . . to be exported to the markets of those other developing or least developed country parties to [a qualifying] regional trade agreement that share the health problem in question.”<sup>213</sup>

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<sup>209</sup> Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345, 346 (2008) (footnote omitted); see also Frederick M. Abbott & Jerome H. Reichman, *The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines Under the Amended TRIPS Provisions*, 10 J. INT'L ECON. L. 921, 973–77 (2007) (discussing the potential benefits of pooled procurement strategies and the establishment of regional pharmaceutical supply centers); SISULE F. MUSUNGU ET AL., UTILIZING TRIPS FLEXIBILITIES FOR PUBLIC HEALTH PROTECTION THROUGH SOUTH-SOUTH REGIONAL FRAMEWORKS, at xv–xvi (2004) (advocating the establishment of “regional procurement systems where they would jointly conduct tendering through an entity acting on their behalf and a central purchasing agency managing the purchases on behalf of all the member countries”); *id.* at 70–73 (discussing regional procurement systems).

<sup>210</sup> See Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, 88 MINN. L. REV. 249, 266 (2003) (“If [Keith] Maskus is correct that strengthening intellectual property law will increase import volumes, then a developing country with an adequate number of consumers may eventually see some direct investment following the successful exploitation of product markets.” (footnote omitted)); Yu, *China Puzzle*, *supra* note 116, at 177 (stating as one of the condition for the intellectual property system to attract foreign direct investment that “the country . . . ha[s] a sufficiently large market to enable foreign firms to capture economies of scale or scope”).

<sup>211</sup> See Peter K. Yu, *Virotech Patents, Viropiracy, and Viral Sovereignty*, 45 ARIZ. ST. L.J. 1573, 1579 (2013) (noting as one of the factors for Brazil’s success in threatening to issue compulsory licenses in the pharmaceutical context its “lucrative middle class market that U.S. pharmaceutical companies cannot afford to lose or alienate”).

<sup>212</sup> TRIPS Agreement, *supra* note 118, art. 31*bis*(3).

<sup>213</sup> *Id.* The qualification is that “at least half of the current membership of [that agreement] is made up of countries presently on the United Nations list of least developed countries.” *Id.*



## CONCLUSION

In fall 2013, China launched the BRI, raising a series of questions concerning what this new initiative would mean to the Asia-Pacific region and the outside world. Although the Chinese government's guiding document, *Vision and Actions*, has provided some clarity to the initiative's core objectives and geographical reach, commentators remain divided over the BRI's overall benefits, potential drawbacks, and future impacts. Many of these commentators also encounter considerable analytical challenges when they examine this fast-evolving and highly malleable initiative.

In view of the very limited analysis the BRI has thus far attracted from intellectual property commentators, this Article devotes the space provided by the present Symposium to explore the initiative's potential development in this area. Showing how this initiative has not yet attracted much concrete policy formulation, the Article underscores the opportunity to shape the BRI's future in the intellectual property area. Specifically, this Article identifies six possible areas of cooperation, whose in-depth exploration could deepen our understanding of the BRI and its potential impact on international and regional intellectual property norm setting.

Even with all the detailed analysis provided in this Article, some commentators will still worry about the problems and challenges brought about by this new initiative. Finding the motives behind the BRI highly suspicious and potentially alarming, these commentators will question whether the initiative will enhance China's power at the expense of other countries along the Belt and Road. They will also explore whether the initiative will greatly undermine the structural integrity and continued vitality of existing international and regional intellectual property systems. Given the historical conflicts and border disputes in the Asia-Pacific region<sup>214</sup> and the highly polarized nature of any debate on China policy, these worries and fears are not difficult to understand.

Unlike the commentators in the first camp, some commentators will be excited about the BRI's promise and ongoing development. For those in China, this initiative will greatly enhance

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<sup>214</sup> See Yang Danzhi, *Situations in Southeast Asia and Constructing Maritime Silk Road*, in CHINA'S BELT AND ROAD INITIATIVES, *supra* note 8, at 157, 160 (noting the tensions between China and its neighbors—most notably, the Philippines and Vietnam—in the South China Sea).

the country's integration with the outside world while generating new opportunities for outbound investment.<sup>215</sup> The BRI will also help rejuvenate the country, bringing benefits that are comparable to those generated for centuries by the ancient Silk Road.<sup>216</sup> Even for those outside China, the drive for greater connectivity and regulatory coordination along the Belt and Road seems to be, on balance, desirable.<sup>217</sup> While greater integration into the global economy will undoubtedly enhance China's power, such integration will also benefit the world. Issues relating to trade, investment, and development do not always play out as zero-sum games.

Finally, a third camp exists and holds positions that are somewhere in between. While commentators in this camp remain excited about the BRI's prospects, they are equally worried about its well-documented perils. Given the yin-yang mentality commonly found in China-related analysis,<sup>218</sup> and the tremendous complexity within China,<sup>219</sup> these commentators feel comfortable reconciling the

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<sup>215</sup> See VISION AND ACTIONS, *supra* note 9, pt. I (stating that the BRI "will help align and coordinate the development strategies of the countries along the Belt and Road, tap market potential in this region, promote investment and consumption, create demands and job opportunities").

<sup>216</sup> See *supra* note 47 and accompanying text.

<sup>217</sup> See VISION AND ACTIONS, *supra* note 9, pt. I (stating that the BRI is aimed at "encouraging the countries along the Belt and Road to achieve economic policy coordination and carry out broader and more in-depth regional cooperation of higher standards").

<sup>218</sup> See generally Peter K. Yu, *Clusters and Links in Asian Intellectual Property Law and Policy*, in ROUTLEDGE HANDBOOK OF ASIAN LAW 147, 148 (Christoph Antons ed., 2017) [hereinafter Yu, *Clusters and Links*] ("[T]here is no easy way to discuss intellectual property developments in Asia without also mentioning their complexities."); Peter K. Yu, *Intellectual Property, Asian Philosophy and the Yin-Yang School*, 7 WIPO J. 1 (2015) (discussing the application of the Yin-Yang school and correlative thinking to the intellectual property field); see also CHEN JIANFU, CHINESE LAW: CONTEXT AND TRANSFORMATION 10 (2008) (noting the influence of Yin-Yang Jia on traditional Chinese conceptions of law).

<sup>219</sup> As David Shambaugh observed:

China remains a deeply conflicted rising power with a series of competing international identities. Many new voices and actors are now part of an unprecedentedly complex foreign-policy-making process. Consequently, China's foreign policy often exhibits diverse and contradictory emphases. Understanding these competing identities is crucial to anticipating how Beijing's increasingly contradictory and multidimensional behavior will play out at the world stage. Each orientation carries different policy implications for the United States and other nations.

David Shambaugh, *Coping with a Conflicted China*, 34 WASH. Q. 7, 7 (2011); see also Mayer, *supra* note 18, at 7 ("One reason China has not yet developed a clear self-understanding is because of the country's ambivalent nature. It can be seen as both weak and strong. Its character is both 'developed' and 'developing.' China is both backwards and

seemingly diametrically opposed views of the two previous camps.<sup>220</sup> Knowing that the BRI will provide both benefits and drawbacks, these commentators recommend countries along the Belt and Road to participate in the initiative with their eyes open. As one commentator warned, “one should remember the adage ‘Be careful what you wish for.’”<sup>221</sup>

There are strong arguments to support the views of each camp, and this Article does not opine on whether the view of one camp is superior to, or more supportable than, the others. Oftentimes, the analysis will depend on one’s worldview, ideological values, and policy preferences. Nevertheless, before we can determine which camp best reflects our preferred position, we will need a deeper understanding of the BRI. If this Article can help develop this crucial understanding—in the intellectual property area, in particular—it will have accomplished its mission.

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cutting edge at the same time.”); Yu, *Clusters and Links*, *supra* note 218, at 148 (noting “the duality—or the yin and yang—inherent in Asian societies”); Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 25–26 (discussing China’s schizophrenic position in the international intellectual property arena). As I noted in the intellectual property context:

China is “a country of countries.” The country is large, complex, diverse, and “sometimes internally contradictory.” The Chinese speak different languages, enjoy different cuisines, grow up with different cultures, and subscribe to different historical and philosophical traditions. Conditions in Beijing are often very different from those in Guangzhou, intellectual property strategies that are effective in Shanghai are likely to fail in a village in Guizhou, and the trade patterns found near the coasts are very different from those found inland.

Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046, 1118 (2011).

<sup>220</sup> See Li & Duarte, *supra* note 112, at 282 (“Heuristically, the phenomenon of a set of persistent ‘bifocal lenses’ of opportunity-threat in studying the impact and implication of the rise of China . . . helps us to develop a multi-dimensional approach to understanding the multi-facets of China’s ‘One Belt One Road’ initiative.”).

<sup>221</sup> Nora Fisher Onar, *Former Empires, Rising Powers: Turkey’s Neo-Ottomanism and China’s New Silk Road*, in RETHINKING SILK ROAD, *supra* note 8, at 177, 188 (emphasis omitted).